REPORT OF

THE HONOURABLE

E.N. HUGHES Q.C.

WITH RESPECT TO THE

PROCESS AND PROCEDURE

IN THE
INVESTIGATION, CHARGE, ARREST,
PROSECUTION, STAY, AND SUBSEQUENT ACTIONS

OF THE OCTOBER 3, 1990
HARVEY I. POLLOCK, Q.C. CASE

WINNIPEG, MANITOBA

SEPTEMBER, 1991

92-00513/

COMMISSION OF INQUIRY
under authority of Manitoba Regulation 440/91

THE HONOURABLE
EDWARD N. HUGHES, Q.C.
COMMISSIONER

THE LAW COURTS
WINNIPEG, MANITOBA, CANADA
R3C 0P9

JOHN M. SCURFIELD, Q.C.
COUNSEL

September 12, 1991

The Lieutenant Governor in Council
Province of Manitoba

Pursuant to the recommendation of the Honourable James C. McCrae, Attorney General and Minister of Justice for the Province of Manitoba, you ordered on May 1, 1991, this Commission of Inquiry. This was done pusuant to Sections 83 and 96 of the Manitoba Evidence Act, C.C.S.M. E150.

Under the Order I was appointed Commissioner to inquire into and report on the process and procedure with respect to the investigation, charge, arrest, prosecution, stay and subsequent actions pertaining to the case of Harvey I. Pollock, Q.C.

I have carried out this assignment to the best ability. I am pleased to submit my Report, as attached.

Respectfully,

Edward N. Hughes, Q.C.
Inquiry Commissioner

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CHAPTER I
INTRODUCTION

A. TERMS OF REFERENCE AND RELATED PRELIMINARY MATTERS

On the first day of May, 1991, the Lieutenant Governor in Council of Manitoba passed Order in Council #440 ordering an Inquiry pursuant to the Manitoba Evidence Act, C.C S.M. E150 into a matter pertaining to the administration of justice within the province and I was appointed as Commissioner for that purpose.

The Order recited that:

1. "Mr. Harvey I. Pollock, Q.C. was charged, arrested and prosecuted with respect to an alleged sexual assault on October 3, 1990";
2. "The said charges were stayed by the Public Prosecutions Branch of the Department of Justice on December 19, 1990";
3. "The Minister of Justice and the Attorney General has determined that the said proceedings will not be recommenced";

and then ordered that the matter to be inquired into shall be:

"The process and procedure followed by the City of Winnipeg Police Department and the Public Prosecutions Branch of the Department of Justice with respect to the said investigation, charge, arrest, prosecution, stay, and any subsequent actions or conduct pertaining thereto by the two aforementioned bodies and also by the City of Winnipeg and in particular to inquire into:

(a) the correctness and adequacy of the process and procedure applied;

(b) the good faith, objectiveness and professional standards with which these processes and procedures were applied and decisions made."

The inquiry convened at the Court House in Winnipeg on June 6, 1991. At that time several applications for standing were considered and ruled upon. During subsequent sessions, further standing applications were heard. Those afforded standing, and counsel appearing on their behalf were;

1. H.I. Pollock, Q.C. (Counsel - D.C.H. McCaffrey, Q.C.)
2. Department of Justice (Counsel - K.B. Foster, Q.C.)
3. Winnipeg Police Senior Officers Association and Paul Johnston - (Counsel - M. Myers, Q.C.)
4. City of Winnipeg (Counsel - E.W. Olson, Q.C.)
5. Ms. G.H. (Counsel - C. Blaneru)
6. Winnipeg Police Association (Counsel - D. Abra)
7. Sergeant D.A. Feener (Counsel - R.B. McNicol, Q.C.)
8. Sergeant R. Kushneryk (Counsel - E.A.D. MacInnes, Q.C.)
9. Chief H.B. Stephen (Counsel - R.Dewar, Q.C.)
10. L.H. Reynolds (Counsel - S. Green, Q.C.)

Prior to the opening session I appointed as Commission Counsel, John M. Scurfield, Q.C., who appeared throughout the hearings and was assisted in that role by his associate, D. Kent Paterson. I am indebted to both for the comprehensive and efficient presentation and testing of the evidence before the Inquiry. Ben Moroz acted as filing clerk and performed his duties in an entirely satisfactory manner. I am also indebted to each of the Counsel listed above and in some cases to associates with them. In each instance they, very ably, represented the interests for those on whose behalf they appeared, and they also were of considerable assistance to me.

The presentation of evidence commenced on June 24, 1991 and by July 18, 1991, the final day of presentation, 25 witnesses had been heard over eighteen sitting days. On July 24, 25, and 26, 1991, counsel presented oral and in some instances written submissions with respect to arguments on behalf of their clients. On July 26, 1991, one further witness was heard.

Transcription of the evidence and arguments took place, the former totalling approximately 4,800 pages and the latter an additional 850 pages. Since completion of the hearing, I have had the opportunity of studying this volume of material as well as the content of the fifty-eight exhibits that were filed. Those giving evidence in order of appearance were;

1. Ms. G.H.(This is the complainant with respect to the alleged sexual assault. At trial an order was made that her name not be published in any form in the media or in any manner to identify her. That ruling was respected at the Inquiry and I do the same in this report.)
2. Harvey I. Pollock, Q.C.
3. Constable J. Kapka
4. Sergeant R. Oliver
5. Sergeant D. Ridley
6. Constable A.M. Bettens
7. Inspector R.G. Hall
8. Sergeant R. Kushneryk
9. Sergeant D.A. Feener
10. Constable K.M. Hodgins
11. Sergeant B.R. Vokey
12. Inspector M.R. Bell
13. Superintendent W.D. Toyne
14. Inspector R.K. Dawson
15. P.A.R. Johnston
16. W.B. Owen
17. D.A. Whyte
18. Chief H.B. Stephen
19 L.H. Reynolds
20. J.G.B. Dangerfield, Q.C.
21. R.A. Finlayson
22. B.H. Miller
23. M.H. Britton
24. S.J. Whitley, Q.C.
25. A.S.G. Garson, Q.C.
26. G.A. Olsen

B. BACKGROUND EVENTS

Mention was made at the Inquiry of four events, some in more detail than others, that preceded the investigation and arrest of Pollock. I will also make reference to them in the body of this report and, for that reason, I refer to them at this time, in chronological order:

1. Strike at Super Value at Grant and Kenniston, Winnipeg, - June 1987.

   The Winnipeg Police Department was called to keep the peace at a scene of violence that had erupted at or near a picket line. A union member had been charged with assault of a police officer arising out of an incident that occurred while the officer was escorting another member who had been taken into custody. S.J. Whitley, a long time employee of the Ministry of the Attorney General and who had recently been named Director of the Public Prosecutions Branch of the Ministry, subsequently received a video of the scene that resulted in the assault charge being laid. He made the video available to Chief H.B. Stephen of the Winnipeg Police Department. Whitley's intention was to raise the appropriateness of charging in a situation such as existed and he thought that the video would be a focus for such a discussion. He had what he thought was an amicable discussion with the Chief on the matter but when they were joined by the Deputy Chiefs, it was apparent that some of them took strong exception to Whitley's view of the matter. Among those present was Deputy Chief Paul Johnston, who was in charge of the Crime Division. He took very strong exception to the manner in which Whitley viewed the situation. The Deputies disputed Whitley's view that a charge of assault was not warranted. The meeting concluded on a sour note.

2. Ticketgate

In mid 1987, the Winnipeg Police Department commenced an investigation of traffic ticket fixing activity within the Provincial Court of Manitoba at Winnipeg. In early fall, senior Crown Attorney in the Attorney General's Ministry, George Dangerfield, was consulted by the Police and he remained as sole legal advisor for some period of time. Telephone line interceptions were authorized between September 1987 and January 1988. In early January Mr. Whitley, who was Mr. Dangerfield's immediate supervisor, was brought into the picture. Whitley and Dangerfield spent many hours with police officers evaluating the evidence gathered by the police. Three categories of suspects were agreed upon. It was proposed that the first group be arrested and charged but that the second group be given a police warning and interviewed. The third group, whose involvement was thought to perhaps go no further than innocent complicity, was to be seen and police warnings given "as the case may be" when interviewed. In all, there were thirty two names on the list. Two were Judges, one a Magistrate, and many of the remaining were lawyers. Senior police officers and members of the Attorney General's Ministry, including Whitley and Dangerfield, met with the Attorney General, the Deputy Attorney General and the Assistant Deputy Attorney General, Criminal Justice, on January 13, 1987, in order to brief them. It was agreed that warrants would be sought for the arrest of twelve persons. By January 17, 1988, this number had increased and eighteen arrests had, by then, been made. By late February, twenty-five additional cases were referred by the police to the Crown office for evaluation and opinion.

The case against one Judge was heard and an acquittal entered. The other Judge and the Magistrate entered guilty pleas. Their cases were disposed of on March 16, 1988, and April 22, 1988, respectively. On May 6, 1988, the Crown directed in Provincial Court that proceedings be stayed in all but one of the remaining cases. In that case there had been a committal for trial. Two weeks earlier Mr. Dangerfield had met with senior police officers and informed them of the intention to stay the remaining cases. The police officials expressed their disapproval in the strongest possible terms and in fact they had done that over the preceding months when the possibility of stays were first discussed back in January. The police position was that the entering of stays would make the investigation, charges and arrests appear unwarranted and improperly motivated.

In June of 1988, the new Attorney General appointed the Honourable A.S. Dewar to review the entire Ticketgate matter and report the results of that investigation to him. Of the circumstances surrounding the stays, Mr. Dewar, in his report, stated at pages 59 and 60 as follows;

> "After R. v. Trudel was disposed of on March 16 and a disposition in R. v. Steen (on April 22) was in sight, the reasoning within the Crown office became firmer and more focussed. It can be summarized as follows: Trudel and Steen, viewed as the principal malefactors, having been convicted and removed from office and steps taken within the Provincial Court to prevent a recurrence, the original public purpose of protecting and preserving the integrity of the justice system process had been, and had seen to be, fulfilled.

Further prosecutions would not enhance what had been accomplished already, and were needless as well as unsupportable on any proper basis. Lawyers and civil servants could be referred to their respective professional or occupational disciplinary processes. All would then have been treated alike in the criminal justice system except Donald Bebbington whose case involves circumstances not common to the others.

As to the timing--following the Steen disposition on April 22, the next remand date was May 6, when it would be necessary to set at least some trial dates for the remaining cases. This crystallized thinking on the question of the public purpose to be served by further prosecutions. The question was a proper one. Messrs. Guy, Whitley and Dangerfield reached the decision that proceedings should be stayed as against all of the remaining accused except Donald Bebbington and that this should be done on May 6. The decision was one they could make and it could have been given effect with or without the approval of the Attorney General. Their reasoning about taking it to him, as they did, was that a public statement should be made and the reasons for the decision explained. Further, the same advice would be given to his successor in office. However, trial dates would be fixed by then, and a successor would not have the knowledge or background of the litigation enabling him to consider the matter at an early date. The Attorney General accepted the advice and made the May 6 announcement. Mr. Dangerfield attended in Court and directed entry of the stays of proceedings.

This review is satisfied no partisan political interference or influence was exercised on the Attorney General."

The Honourable Mr. Dewar went on to note that in April a provincial general election had been held and that the Government and the incumbent Attorney General had been defeated. When the May 6, 1988 announcement was made, the Attorney General was about to leave office. Commenting on the Attorney General's statement of May 6, 1988, in which he outlined the reasons for the stay, the Honourable Mr. Dewar on pages 62 and 63 of his report, stated;

"The basis of the decision to stay proceedings, namely, that the initial public purpose had been fulfilled and further prosecutions were not in the public interest, is truly reflected in the Attorney-General's statement and the timing, as noted, was to meet the requirements of the pending litigation, as seen by the Crown office prosecutors.

That the Attorney-General had concerns about the behaviour of the lawyers and of the civil servants charged is clear. He notes that these two groups will be referred to other authority for discipline, this latter step to allay the concerns otherwise than by employing the full weight of prosecution. One may question this approach, but not deny that the alternative was considered.

Given the reasons expressed by the Attorney-General on May 6 in the exercise of the responsibilities of his office, the decision is supportable. In that sense the basis is valid.

Regrettably, public opinion is not entirely supportive. In the course of this Review strong responsible opinion has been encountered condemning the decision.

An informed public understanding has not been fostered by the disclosures made in R. v. Trudel and R. v. Steen. The stays of proceedings in other cases has only added confusion. With hindsight, continuing the prosecutions, or some of them, may have avoided this, but to take that step now would invite further confusion by, in effect, substituting for a supportable decision (as seen here) made in the exercise of power vested in the Office of the Attorney-General, an opposite decision, albeit one made by a successor in office independently applying his mind judicially as sole judge of the relevant considerations."

The Winnipeg Police Department won praise from the Honourable Mr. Dewar for its handling of the investigation. He found that it had been properly conceived and motivated from a high sense of duty to serve an important public purpose; was managed and carried out responsibly and objectively with commendable police skills; was thorough; stands as a credit to the Winnipeg City Police and the personnel involved and that the decisions to obtain authorization to intercept private communications, search warrants, and arrest warrants were based on proper considerations and were all well founded.

The role of the Crown was not dealt with in similar complimentary terms and the Honourable Mr. Dewar made several criticisms of the manner in which officials within the Ministry had handled the matter. He was of the view that a special prosecutor from the private bar should have been retained and instructed; that case management and control within the Crown office was not appropriately organized and remained weak and inadequate throughout; and that professional standards exhibited by Crown counsel in the three cases which went to Court fell short of the standards to be expected of counsel serving the public interest.

On November 17, 1988, the new Attorney-General released the Dewar Report. He expressed his agreement with the former Chief Justice that no purpose would be served by reopening the cases that had been stayed. He agreed that the department of the Attorney General did not respond adequately to the unique challenge presented by the need to investigate one of the branches of the department, namely, the Provincial Court system. He acknowledged other shortcomings addressed by the Honourable Mr. Dewar. He concluded that disciplinary action was appropriate with respect to four senior officials, namely, the Deputy Attorney-General, the Assistant Deputy Attorney General - Criminal Justice, the Director of Public Prosecutions and the senior Crown Counsel. The Attorney-General concluded his statement as follows;

"The release of the Dewar Report today marks the end of a sad chapter in Manitoba's Judicial History. The Report's positive findings about the Police investigation and the Crown's motivation together with the commitment of the Government to comply with all the recommendations should however restore the confidence of Manitobans in the integrity of the Courts, the office of the Crown Counsel and the City of Winnipeg Police."

3. The Death of J.J. Harper and Subsequent Inquest and Aboriginal Justice Inquiry.

On March 9, 1988, Mr. Harper died on the street in downtown Winnipeg from a bullet that came from the gun of Constable Robert Cross, who was present at the scene. Also present on that occasion was Constable Kathryn M. Hodgins, the partner of Cross and a witness in the Inquiry before me. At both the subsequent Inquest and Commission of Inquiry called by the Government of Manitoba which became known as the Aboriginal Justice Inquiry, Harvey I. Pollock, Q.C., appeared as Counsel for the family of the late Mr. Harper. One of the principal focuses of the Aboriginal Justice Inquiry was the circumstances surrounding the Harper death. On those two occasions and also in direct contact with the media, Pollock made critical comments of the police involvement in the Harper death. He expressed the view and said that he continues to be of the view that a cover-up was involved. He was specifically critical of the quality of the evidence at both the Inquest and the Aboriginal Justice Inquiry given by Hodgins. Hodgins' husband made a complaint to the Law Society about the comments of Pollock in that regard and following consideration by the Law Society, a letter of reprimand was sent to Pollock with respect to statements made by him to the media.

With reference to his arrest and charge of sexual assault, the following question was asked of Pollock by Commission counsel at the Inquiry before me and he gave the indicated answer;

Q. "Now, after you were arrested, you or your counsel on your behalf told the media that you felt the way in which you had been charged had something to do with the J.J. Harper Inquiry and may indeed be an attempt at payback, or something of that sort, by the Winnipeg Police Department. Do you recall using words to that effect?

A. Yes, I think I made that statement. I didn't say anything from the time of my arrest until the proceedings were stayed on the 19th of December. I think on the 19th of December, I made a statement to the media saying that this was vindictive and this came out of Harper. This was Harper, this was -- all emanates out of Harper." (p. 357)

4. <u>The Gindin Matter</u>

This was an event of February, 1990. A murder trial was in progress in Winnipeg. A person considered to be a key witness at that trial disappeared from Winnipeg notwithstanding that a subpoena had been served for his attendance at trial. The witness was apprehended in Vancouver and returned to Winnipeg. On his return, he said that he had been bribed by two people to leave the city. One of those identified was Winnipeg lawyer Gindin who was defense counsel at the murder trial. A police investigation was conducted and on February 23, 1990, the other of the two alleged offenders was arrested and charged with conspiracy to obstruct justice. The police had been in touch with Dangerfield who assisted them in this endeavor.

On February 26, 1990, a request was made of Dangerfield by telephone, to assist in wording a charge of conspiracy to obstruct justice against Gindin who was being held in custody. Dangerfield was not able to comply with the request and immediately went to discuss the matter with Whitley who by this time had become the Assistant Deputy Attorney General, Criminal Justice. Dangerfield indicated that he did not believe he had sufficient information to advise on the wording of a charge. He was of the view that the witness was a man of doubtful reputation with a criminal record. He wanted information with respect to available evidence to back up the story of the witness, such as the payment of money which at that time was not yet available. Dangerfield did not know the time frames involved nor, specifically, the dates. He accordingly, in a telephone call back to the police department declined, at that time, to advise on the appropriate wording for a charge. Soon after that phone call, a meeting was convened in Whitley's office attended by Deputy Chief Johnston, Superintendent Toyne, two other officers and Messrs. Whitley, Dangerfield and Miller from the Crown side. A stalemate soon developed. The Police were emphatic that they were not seeking an opinion on whether to lay a charge. They had already decided to do so because, in their opinion, this was a very strong case. What they wanted was assistance in the wording of the charge. The police acknowledged that they were dealing with a charge that they did not normally lay, namely, one of conspiracy. Whitley and Dangerfield were equally emphatic that the impossible was being asked of them. They wanted additional information and recommended the release of Gindin and the continuance of monitoring of his telephone lines pursuant to an interception order that was then in place.

The impasse was not resolved. The police obtained assistance elsewhere and laid the charge. Gindin faced a preliminary inquiry on the charge but the matter was dismissed at the conclusion of that proceeding. That result only occurrs where the presidng judge decides that there was no evidence to support the charge. That conclusion stands in sharp contrast to the view taken by the police from the very outset, that this was a strong case.

Chapter II
The Events of October 3, 1990 in Pollock's Office

By appointment, G.H. entered the inner office of her lawyer, Pollock, at about 12:10 P.M. on that day. She had been there on one previous occasion and she had made the October 3, 1990 appointment during a telephone conversation with the office the previous day. Pollock was acting for G.H. on a claim for damages for personal injury resulting from an automobile accident. At the time of making the appointment, a message of good news in finalizing her claim was communicated to her. She thought that meant that a cheque would be available for her on October 3, 1990. Rather, what awaited her was a progress report that indicated the settlement figure would be considerably more than what was previously indicated.

In anticipation of receipt of the settlement cheque, G.H. and a companion stopped off at a nearby drinking premises on the way to the law office and each had a couple of beers. She was in no sense intoxicated or under the influence of alcohol when she attended in Pollock's office. Pollock did, however, smell the beer on her breath. For reasons that were explained to me, and which I understand, Pollock abhors the excessive consumption of alcohol. This results from the death of his son in 1982 from the actions of an impaired driver. That led Pollock to suggest to G.H. that perhaps she had a drinking problem. He inquired about whether she had given consideration to joining A.A. and in her presence, he tried to telephone her welfare worker about her drinking. G.H. was greatly offended by what she described as "this lecture" that she did not come to the office to receive. She became both annoyed and angry with Pollock. Clearly, Pollock stepped outside his professional responsibilities to his client in offering his opinion and gratuitous advice on this subject. G.H. soon afterwards complained about the matter to the Law Society of Manitoba and I believe that was an appropriate action for her to take. The subject then turned to her claim and Pollock initiated a discussion of the extent of

her injuries in order to prepare himself for a coming negotiating session with the insurance adjuster.He asked her to list her injuries. She identified her right arm or wrist, shoulder, elbow, knee and lower back. With reference to the back, she described a broken spine. Medical reports in Pollock's file disclosed no fracture to the back or spine. Pollock wanted to learn more about the injury. He asked G.H. to take off her jacket and come around his desk beside him and point to the injured area. She complied and to satisfy himself what she was complaining about Pollock, after G.H. pointed to the area on her body that was causing her the discomfort, reached out with his right hand and with the ball of his thumb felt the area over her clothing that she had indicated as being troublesome to her. The body contact was of short duration - a few seconds at most. Pollock said he had her remove her jacket as she did not expect she would be able to be precise in pointing to the injured area with the jacket on. Pollock was asked a number of times and in a number of ways why he touched G.H. Representative of his responses was;

> "I envisaged that her complaint was that there was some protrusion, that if I touched it with my thumb I would feel it. And then maybe I could say something about it if I am writing the doctor." (p.392)

G.H. soon expressed her displeasure at what Pollock had done. G.H. acknowledged that when inviting her to come around his desk and take off her jacket, his stated purpose was to examine her injuries. I accept that that was the reason for Pollock's actions. When asked if she had any reason to believe that there was some sexual purpose for the touching, she answered, "no, no, that never crossed my mind". In written statements to police officers on occasions after this happening, G.H. indicated that the touching occurred following Pollock's indication of wanting to examine her injuries.

Before placing his thumb on G.H.'s body, Pollock should have expressly asked permission if he was intent on doing this, because, as G.H. said, many times, "he is not a doctor".

It was unusual conduct for a lawyer and in her letter to the Law Society, G.H. also registered a complaint about her lawyer touching her. Again, I believe this was a proper matter for her to raise in that forum. I can, however, understand Pollock's state of mind. He believed that he was conducting the examination with the consent or approval of G.H. He explained it this way;

> "She pointed, again, she faced me face on, she pointed to her right wrist, elbow, shoulder, knee, and then she turned around and pointed towards her lower part of her back, where she said she had - and I have got a broken spine and that hurts. So I knew that there was nothing in the medical reports relating to a broken spine, so as she pointed to it, I guess maybe in retrospect I ought to have asked her, but I believe given the circumstances I was in fact sort of being invited to inquire for myself, to satisfy myself as to what she was complaining about. I extended my hand, my right hand, and I put it up against the back of her, lower part of her spine." (pp. 300-301)

And later;

> Q "Let's deal with that. How is it that you say you were in any sense invited to touch her?
>
> A Just by the circumstances, by what she was saying, by the way she turned, by the way her hand led to where she was positioned. I just reached out and touched it. I just found that that was the most natural thing to do next." (p 395)

As I say, I understand how this happened but it was wrong and it should not have happened and I do not want to minimize the justified annoyance felt by G.H. after she had thought over what she had allowed to take place. In giving evidence at Pollock's trial, she said "...I was dumb, you know. I shouldn't have let it happen." She acknowledged at the Inquiry that had Pollock "touched every part of my injuries I wouldn't have minded so much. It probably would not ever bother me". (p 126)

On the other hand, the only part of the body where she complained that something was broken was the spine, the exact place that Pollock had touched.

I believe Pollock, entirely, when he says;

> "I had no interest in this lady, I wasn't interested in her sexually, in any way. I am not interested in other women, I love my wife, I am a happily married man. I have wonderful children, I think I enjoy reasonable respect in this community. I am not about to jeopardize or compromise my position". (p 303)

I venture to say that never, ever has a three second touch, occurring under similar circumstances, attracted so much attention, covered so many hours of discussion, and expended so many thousands of dollars. I intend to try to answer why this occurrence developed into such a "cause celebre". Before I do so, I want as best I can to localize the area of the touching and the extent of it, momentary, though it was.

Buttocks, bum, and other descriptive phrases of that part of the anatomy were repeated ad nauseum as many of the 26 witnesses took their turn at explaining where they understood the touch or rub occurred. Many demonstrated their understanding of the extent of the movement of the hand at the time of the happening. In addition to the only two people present at the event, many police officers and some Crown counsel explained how and where the touching or rub occurred. However, they were all basing their belief on what they understood G.H. told them. I do not say for a moment that any of those who gave this evidence were either attempting to mislead me nor endeavoring to embellish what they understood happened. Nevertheless, the value of their evidence was limited to what G.H. told them.

I believe that G.H. is an honest decent woman. I do not agree with those who say that she changed her story from what she initially

told police and Crown Counsel to what she told the court at Pollock's trial and at the Inquiry before me. As I have indicated, I will have considerable to say about how, I believe, all this occurred and how it could have been prevented. But first, I want to return to make a finding as to the location and extent of the touch.

At the July 15, 1991, session of the Inquiry, at the close of the examination of Crown counsel, Matthew Britton, Commission Counsel conferred with all other Counsel appearing at the hearing. Britton was the Crown counsel who presented the case on behalf of the Crown at the sexual assault trial of Pollock. After the conference, Scurfield put the following on the record in the presence of all counsel;

> "Mr. Commissioner, all counsel are agreed, ...counsel are not intending to challenge for the purposes of this Inquiry, upon hearing Mr. Britton's recollection of what it was that the complainant demonstrated in the Courtroom,...that what he saw was an accurate depiction of what the complainant did at the trial of the action..." (p 4114)

What Britton saw, as told to the Inquiry earlier in the evening of July 15, 1991, was;

> "(Indicating) She rubbed the back of her spine area and did not move her hand down. She rubbed it in an area of the lower back (indicating), and she did not move her hand down between her buttocks in any way whatsoever as she did on previous occasions." (p 4078)

Britton, like so many others, thought this was a marked departure from what G.H. had previously indicated. He described the difference as "quite dramatic". I am not convinced that G.H.'s verbal description of what happened to her varied at any time to any significant degree. It does appear that in the course of

demonstrating the touching prior to trial she may not have been as precise as to the place of the touching as she was before the court and the Inquiry. While I do not believe she saw the significance of this, it is apparent that others focussed almost entirely on her demonstration without listening closely to what she was saying. While G.H. was demonstrating to the Court at the sexual assault trial, she was also explaining the actions to the Court in the following way;

Mr. McCaffrey: "I think if she demonstrated for the record, you could describe it and if we both agree on the description that is about the best we'd be able to do.

The Court: That is fine. If you could describe - my observation of the witness appeared to be from her waist down, perhaps four to six inches down from the waist.

Mr. McCaffrey: That is what I thought.

The Court: In the middle of her waist down.

Mr. McCaffrey: That is what I saw.

The Court: Down her spine, that would be a fair description of what the witness -

The Witness: Your bum, like, you know, how you're curved on your bum, then that's where his hand went up like that, then he stopped where the bone was sticking out where I had my injury.

BY MR. BRITTON

Q. How many times did he touch you like that?

A. I think - I think a couple of times and the third time that's when he said "There's a bone sticking out there".

So, undoubtedly, G.H. in explaining to others did make reference to the bum and it's curve. The extensive use of the term "buttocks" was an adaptation by others to bring, I am sure, a more polite description to the Court of that part of the anatomy, just as those who adopted the use of the term "ass" were describing the same area but with, perhaps, less dignity.

I am satisfied that G.H. never used either "buttocks" or "ass" and yet references were made repeatedly to both at the Inquiry, particularly, to the former, in describing where Pollock's hand had gone. I believe, G.H. was consistent at the Inquiry with what she said and did at the trial. While she went over and over the matter, at the request of numerous counsel, a fair representative of her evidence under questioning by Commission Counsel is the following;

Q. "Now, you indicated to me again when I interviewed you today before court, that you wanted to make clear to the Commissioner something, and that, if I understood you correctly, you listen to me carefully and correct me if I'm wrong, is that to you the bottom of the spine and the bottom of the bum are in the same place; is that right?

A. Yes.

Q. That's the way you would describe your body; is that right?

A. Yes.

Q. Where is the tailbone located? Is it located in either of those places or somewhere else?

A. It's right there.

Q. It's right there?

A. Um-hum.

Q. To you the tailbone and the bottom of the spine and the bottom of the bum would all roughly be the same place; is that right?

A. Yes.

Q. Now, when you showed Mr. Pollock the injuries, were you standing up?

A. Yes.

Q. Did you point to each of the places that you were injured?

A. Yes.

Q. Did you point to the area in your back or your spine or your bum where you were hurting?

A. Yes.

Q. What did he do after you pointed to that area?

A. That's when he - he felt here too, he touched me.

Q. He touched you?

A. Yes, and went back up and came down and then he felt the tail, the bone sticking out. I said that is what you got. And then after -

Q. You said this is what? What did you say to him? You say and that's when I said this is what?

A. That's where my injury was. (pp. 90-92)...

Q. So we can do away with that for a moment, all right.

A. Okay.

Q. When he touched you behind, okay, did he touch you in any place other than the place where you just showed him you were hurting?

A. No, just that spot behind there.

Q. Now, do you think you could just stand up, and I know this is something you don't want to do, but I think it is something you have to do, and see if you can stand up and show the Commissioner, and perhaps counsel can move over to this side of the courtroom.

The Commissioner: Perhaps you can stand down there, because the counsel want to see.

Mr. Scurfield: Okay.

By Mr.Scurfield:

Q. Just show us the area where you were hurting, first of all.

A. Just right here (indicating).

Q. Now -

A. See, and that's part of my bum already.

Mr. McNicol: Could you describe that for the record, what the witness is indicating?

Mr. Scurfield: It's very difficult.

By Mr. Scurfield:

Q. First of all, maybe you could just turn and face the other way. You have got your hand on the spot is that the spot where you are hurting?

A. Yes.

Q. Okay. And you are rubbing a spot which - and I'm not very good at anatomy, but it certainly looks like it's in the tailbone area, it looks like it's about six inches below the waist, I would say, something like that, and in the center of the body. We could -

Mr. McNicol: I'm in your hands Mr. Commissioner, but I would describe it as the midline of the buttocks, unless anybody disagrees with that description.

The Commissioner: Well, I think we will let the counsel put it to her and see what she says and then you can follow it up in cross examination.

By Mr. Scurfield:

Q. All right. Can you show us, to the best of your recollection, how it was that he touched you?

A. (Indicating).

Q. Okay. You are indicating a rubbing motion, up and down?

A. I guess he was feeling this part and to here (indicating).

Q. Is that a bony part or a fleshy part?

A. No, it's a bony part, all the way down to here.

Q. Did he ever touch you in any of the fleshy part of your behind?

A. No, just his hand like that and then he found that bone there.

Q. He found the bone there?

A Um-hum.

Q. After he found the bone, did his hands stray off there or did he stay there?

A. No, he quit." (pp. 93-96)

As I say, other counsel, including McNicol, very extensively, covered the same ground but the consistency that I have said existed, continued in more or less the same way. A few minutes after giving the evidence that I have quoted just above, Scurfield, in closing his examination of G.H., put to her the following questions and received the indicated answers;

Q. "Just to back track, and I am almost done G-----, you will be relieved to hear, when you met with Sergeant Kushneryk and with Sergeant Feener, did you show them what you showed us in court today, or did you show them something different than that?

A. No, same thing.

Q. Okay. Have you ever, in your opinion at least, showed anybody anything different than what you showed us today as being what happened in Mr. Pollock's office?

A. No.

Q. Have you ever told anybody, that is to say Sergeant Kushneryk or any police officer or Crown attorney, a different version of the story than what you are telling us today, in your opinion?

A. I don't think so." (pp. 143-144)

I believe her implicitly and entirely, although, I believe the detail of her demonstrations may very well have varied on occasion.

CHAPTER III
SEXUAL ASSAULT

A. WHAT IS SEXUAL ASSAULT?

Based on the happening in Pollock's office at about 12:10 P.M. on October 3, 1991, Pollock stood trial on December 18, 1991 on the following charge:

> 1. That Harvey Irvin Pollock
> at the City of Winnipeg aforesaid, on or about the 3rd day of October in the year of our Lord one thousand nine hundred and ninety did unlawfully sexually assault G-----H------- contrary to the provisions of the Criminal Code;

The law of sexual assault can be readily summarized by referring to three Supreme Court of Canada decisions:

> R. v. Chase (1987) 59 C.R. (3d) 193 (S. C. C.)
> Bernard v. R. (1989) 67 C.R. (3d) 113 (S. C. C.)
> Pappajohn v. R. (1980) 14 C.R. (3d) 243 (S. C. C.)

The Chase decision outlines the prohibited act, or the actus reus as it is commonly referred to in legal terminology, of sexual assault. The Supreme Court determined that the actus reus of sexual assault consisted of:

> (i) the actus reus of a common assault which for current purposes is the intentional application of force by one to another without the consent of the recipient of the force; plus
> (ii) objective evidence of circumstances of a sexual nature.

MacIntyre J. speaking for the Court, stated at P. 199, 200:

"Sexual assault is an assault, within any one of the definitions of that concept in s.244(1) of the Criminal Code, which is committed in the circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: 'Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?' R. v. Taylor, 44 C.R. (3d) 263 (Alta. C.A.), per Laycraft C.J.A., at p. 269. The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force, will be relevant: see S.J. Usprich, 'A New Crime in Old Battles: (1987), 29 Cr. L.Q. 200, at p. 204. The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances."

The second relevant decision is Bernard v. R. This case dealt with the mens rea or mental element of sexual assault. The Supreme Court determined that sexual assault is a general intent offence and that all the Crown must prove is an intention to commit the assault. The Crown need not prove that the accused intended to act with a sexual purpose. McIntyre, J. (Beetz, J. concurring) stated at p. 144:

"It would therefore be my view that the mental element of the offence in s. 246.2 (c) is only the intention to commit the assault. The surrounding circumstances must be

> considered for evidence of its sexual nature and of the resulting bodily harm. The Crown need not show any further mental element."

Wilson, J. (L'Heureux-Dube, J.) stated at p.154:

> "Sexual assault is a crime of violence. There is no requirement of an intent or purpose beyond the intentional application of force. It is first and foremost an assault. It is sexual in nature only because, objectively viewed, it is related to sex, either on account of the area of the body to which the violence is applied or on account of words accompanying the violence. Indeed, the whole purpose, as I understand it, of the replacement of the offence of rape by the offence of sexual assault was to emphasize the aspect of violence and put paid to the benign concept that rape was simply the act of a man who was 'carried away' by his emotions."

An analogy can be drawn between sexual assault and assault causing bodily harm. In both cases the Crown must prove the actus reas of assault combined with the intention to commit a simple assault. It is then up to the trier of fact to determine if there was bodily harm or in the case of sexual assault, whether the assault was of a sexual nature.

The third relevant decision is Pappajohn v. R. This case dealt with the defence of honest but mistaken belief. One defence to any assault is consent. Pappajohn clarified that if the accused has an honest but mistaken belief in consent, that would constitute a defence to the charge. This is consistent with the basic law of mens rea, which requires intention on the part of the accused. If the accused believes that the party is consenting to the "touching", there can be no mens rea.

In applying the law from those decisions to the facts in the Pollock case, the responsibility resting with the Crown was to prove beyond a reasonable doubt that:

(1) Pollock touched the complainant without her consent;
(2) the touching was intentional and did not happen, for example, by accident;
(3) objectively the touching amounted to touching of a sexual nature. Some of the factors to be considered in assessing this issue would have been the part of the body touched, the situation in which it occurred, any words spoken at the time of the touch, and the intent of Pollock when he touched;

In applying the same law, it would have been open to the defence to have raised:

(i) a reasonable doubt as to whether the complainant consented to the touch, or alternatively;
(ii) a reasonable doubt as to whether the accused, Pollock, honestly believed that the complainant was consenting to the touch.

B. DID A SEXUAL ASSAULT OCCUR HERE?

I have reviewed what occurred at the time (approximately 12:10 P.M., October 3, 1990) and the place (Pollock's office) of the alleged sexual assault. In answering the question just posed, I must remind myself and caution others that I hold no judicial powers of adjudication. Therefore, I am limited to the expression of an opinion. Hopefully, any objective reader of my assessment of what occurred in Pollock's office who then relates that to the applicable law would quickly discern that my conclusion is a negative answer to the question just asked.

The Crown would have difficulty with proof of the first of the three essential ingredients that I suggest rested with it. I believe it was on a mission impossible with respect to the third. Further, if the case went that far, the evidence available to argue the defenses that were available to Pollock was considerable. I see nothing to be gained by me exhaustively spelling out the linkage between the facts and law that has led to my stated conclusion. For, in a concise, summary way, Britton spelled it out in the following few words when entering the stay to the charge in court on the morning of December 19, 1990. Speaking of the evidence of G.H. given to the court the previous day, that "basically...the defendant (Pollock) touched her on the tailbone ..." Britten then said, " I believe that, clearly, her evidence does not support an assault committed in circumstances of sexuality and I agree that the Crown ought not to proceed any further on that particular part of the charge".

I agree with what he said with respect to facts and by inference to applicable law and I also agree with his conclusion that to stay the charge was the proper course of action for him to follow at that stage of the proceedings. I will later say more about the latter.

CHAPTER IV
THE INVESTIGATION AND THE ARREST

G.H. was sincere in her annoyance with the way she had been treated in Pollock's office. She determined to do something about it. Commencing in the evening of the day on which she attended at his office she successively phoned her former lawyer whom she discovered was then on the Bench, a lawyer in Dauphin, the Manitoba Human Rights Commission, and the Law Society of Manitoba. Each of those she called in turn referred her to the next as the most likely place to have her grievances aired. The Law Society requested she put her position in writing and she did so and personally delivered it on Friday afternoon, October 5, 1990. Her letter quite clearly sets out her feelings at that point in time. It reads;

"To Whom it May Concern

Today I went to the lawyer Harvey Pollock of Winnipeg M.B. He started saying that I smelled from booz, and he called me an alcolic, Then he asked me to take my jacket off. I didn't know if I should, it made me think for a few minutes before I did and I showed him my arm & wrist & my knee, also my spine. And thats where he touched me is my bum where my spine is broken.

To myself I don't think he's doctor and that he has to examine me he has no right.

Another thing he told me your drinking and I said so if did its none of your bussiness and he said your only getting 376.00 per month where do you get money to drink. So I told him its none of your business that I come here for Auto Pack.

I said my friends buy drinks for me then he tell me, tell your friends not to buy any drinks & I said I dont have a car and if I want to drink its none of your business. (I hate him)

Yours Truly
G----- H-------

P.S.
He doesn't have to touch me."

G.H. was not unacquainted with the police and their role in receiving and acting on complaints of alleged wrongdoing. Indeed within the previous two years, the Winnipeg Police Department had received six complaints made by her on a variety of matters such as suspicious persons, disturbance, missing persons report, theft, etc. I believe it is significant that that is not where she thought she should take her complaint against Mr. Pollock. I believe that if she thought that a wrongful act, in the sense of criminal activity, had been inflicted upon her that is where she would have gone.

The manner in which the matter found its way into the police records is to be noted. During the early hours of Saturday, October 6, 1990, G.H. called the police to come to her residence to deal with a problem she was having with a teen-age son. An altercation had occurred between mother and son and at that time G.H., who was quite upset and disturbed by the incident, wanted action taken by the police. Constables Jacek Kapka and Hodgins arrived at 4:40 A.M. During the course of taking a statement with respect to the domestic matter, G.H. told the officers they would never believe what her lawyer had done to her. She was told that they would believe her and at that point she identified Harvey Pollock and then demonstrated and told of the touching incident in a manner that approximates what she told the Inquiry. It was made clear that the examination was in the course of an inspection of her injuries. She was asked if she had made a formal complaint to the police. She indicated that she was unaware that that was possible.

She was told that she could do so and Hodgins advised that "it was a sexual assault". Hodgins was asked why she categorized what had happened as a sexual assault. The following is her evidence on that point;

> Q. "And what was the reason that you gave her the term "sexual assault"?
>
> A. She had told me when she goes there, she doesn't want to have to tell everybody everything over and over. "What is it that he did to me? What do you call it?" I told her, "You call it sexual assault." She said, write it down for me, I will forget before I get there."
>
> Q. Why did you use the term "sexual assault"?
>
> A. Because in the area where she had been touched, the way she had been touched, the fact that he had no right to touch her because she hadn't given him permission to touch her, previous experience in taking sexual assaults, it was deemed a sexual assault.
>
> Q. As far as you were concerned?
>
> A. As far as I was concerned, yes." (pp. 1418-1419)

Hodgins recognized that her prior contact with Pollock through the Aboriginal Justice Inquiry could signal a conflict of interest situation, and accordingly, said she wanted nothing to do with taking a complaint of sexual assault by Pollock. She wrote out for G.H. the address of the Crime Section of the Winnipeg Police Department where she could go to make a complaint and she recorded, in her handwriting, immediately beneath that information "Sexual Assault Complaint against Harvey Pollock".

The matter was reported on back at the Police Department after the return of Constables Kapka and Hodgins. G.H. made telephone calls to the station about the matter on October 6, 1990, and during the evening of that day Sergeant Dale Ridley and Constable Anthony Bettens were sent to her residence to formally take a written statement from her.

Time of arrival was about 11:00 P.M. A signed statement was taken from her. Once again, the story was generally consistent in that she told of the circumstances of the lecture on alcohol and the identification of the injured areas and the subsequent examination of the "bum" location. The statement refers to Pollock rubbing her "on the crack of my bum 2 or 3 times". While the officers say those are G.H.'s words, she denies that is so. She says she wouldn't talk like that to anybody. I believe her. That would not be her nature or style. Perhaps, what occurred was that when she demonstrated for the officers, they perceived her hand in that location because Sergeant Ridley did agree, at the suggestion of counsel, that what she had done was indicate a rubbing motion between the cheeks of her buttocks. The officers reported back at the station on the call they had made to G.H.'s residence. After attending to taking a statement from G.H.'s companion who went with her to the law office on October 3, 1990, but did not enter Pollock's inner office with her, the Staff Sergeant on duty decided the matter should go to the Crime Division for further consideration and attention. Before the overnight shift completed its work, the Staff Sergeant received a written report from Ridley and Bettens and he then took that report with a note attached to it to the desk of Inspector M.R. Bell in the Crime Division and left it there expecting that the Inspector would take possession of it on arrival at his desk on the following Monday morning.

Inspector Bell came to his office on Monday, October 8, 1990, a statutory holiday. He read what had been left for him and secured the documents overnight. The following day Sergeants Ronald Kushneryk and Donald Feener, two experienced investigators in the Crime Section were directed to re-interview G.H. and her companion, (C.L.), and to take statements from them. The purpose of the latter statement was to learn, from the companion, what G.H. had told him went on in the inner office immediately after their departure from the law office.

The officers picked up G.H. at about 1:00 P.M. on October 9, 1990. They had received their instructions during the morning hours. They brought G.H. to the Crime Division office for the interview. The two persons were interviewed separately but by 4:30 P.M. the interviews had been completed and they were each returned home. By that time, Kushneryk was ready to report to Bell who was, at the time, the acting Superintendent of the Crime Division and also to the Superintendent of the Crime Division who at the time was the acting Deputy Chief, Dennis Toyne.

The statement taken from G.H. was written out by Kushneryk. She demonstrated what Pollock had done to her. Sergeant Feener stated that the words in the statement were not all G.H.'s exact words although some were her words. It was a narrative taken down by Kushneryk as best he could using as his source the spoken words of G.H. and, as well, her demonstration. The statement described Pollock rubbing her bum about three times and that his hand went down to the bottom of her bum but not between her legs. G.H. acknowledged that at the time that this occurred she was, at the request of Pollock, showing him her injuries and she had just touched the injured areas herself immediately prior to Pollock reaching over with his hand and placing it upon her.

The 4:30 P.M. meeting took place in the Crime Division office. Kushneryk presented the written statements that had just been recorded from G.H. and her companion. Bell said they spent about 20-25 minutes going over the actual details of the statements. That included the statements taken by the officers prior to October 9, 1990, as well as those that had been taken that afternoon from G.H. and C.L. by Kushneryk and Feener. Kushneryk advised that he felt there were reasonable and probable grounds to go out and arrest Pollock on a charge of sexual assault. Bell concluded at some point in the meeting that, in his mind at least, there was no doubt that a sexual assault had taken place. Toyne was in agreement with Kushneryk and Bell.

On this point, Bell advised the meeting that many years ago he had read about a Canadian case that ruled that the circumstances that existed in the situation under consideration relating to the touching of a woman's breast was a common assault. He therefore suggested putting matters on hold until the next morning when the opportunity would be available to question Crown counsel on this point. This was agreed upon. Kushneryk then left the meeting. Toyne's evidence summarizes the basis on which the matter was left by the three of them;

Q. "All right. But in summary, it would be fair to say that based on what Sergeant Kushneryk had told you and based on the material that you saw in the reports, you formed the impression that she appeared to be a credible complainant?

A. Yes, in my mind, she did.

Q. It would be fair to say, would it not, that you then decided that there was enough evidence in front of you to go out and arrest Mr. Pollock?

A. That's correct. In my mind, we had a prima facie case of sexual assault, and we did have the grounds to arrest.

Q. Although that conclusion was reached at the meeting, it was decided that the matter should be referred the next day to the Crown Attorney at his regular meeting with you in order to determine what the proper charge would be?

A. Inspector Bell did bring up the fact that he had read a periodical where a female who had been touched on the breast, that this had been deemed a common assault. I did not feel that this fit the situation we were dealing with, but I agreed with him, and we erred on the side of caution. He would get an opinion on the nature of the charge.

Q. In fairness, I understand from some of the memos that have been filed that the group as a whole felt that this was a case of sexual assault and the reference as I understand it was just to confirm that feeling?

A. That's correct." (pp. 1853-1854)

Bell and Toyne met together for a further few minutes for the purpose of deciding about how to approach Crown counsel the next morning. They agreed that counsel would neither be provided with the name of Pollock as the potential accused nor with the police report that included the statements from the complainant. Both witnesses were asked the reason for the decision to withhold information from Crown counsel. Their answers were consistent one with the other. Bell expressed himself as follows;

> "I felt in my own mind that if I were to provide the name of the lawyer to the Crown, that in all likelihood, I would not have got the advice I was seeking. And this comes from a knowledge I have of past dealings with an individual in the Justice Department. I also wanted to get a completely unbiased opinion on the nature of this charge...
>
> The reason for not providing the name stems from several incidents that go back roughly almost three to four years, and it basically involves dealings we have had with the Justice Department on other cases involving lawyers, judges, court officials, their friends in one instance, and in another instance it was a lawyer...
>
> I have nothing but respect for the Justice system in this Province. I have concerns with an individual in the Justice Department." (pp. 1526-1527)

Bell advised that the individual of whom he spoke and with whom the Winnipeg Police Department had particular problems, was S.J. Whitley, Assistant Deputy Attorney-General, Criminal Justice.

Of particular concern to me is the summary dismissal by the officers of the circumstances surrounding the touching - the explanation that Pollock had done as indicated with his hand in the course of examining the injuries for which he was endeavoring to obtain compensation for G.H.

That explanation was known to the officers through the content of the statements from G.H. Toyne explained the out of hand dismissal, at the time of the October 9, 1990, Kushneryk, Bell and Toyne meeting, of the explanation for Pollock's physical contact with G.H. He said;

> "Well, at that point, the only explanation that we had from Mr. Pollock is that he was checking her injuries. I totally rejected this initially, because he did not check all of her injuries, he only checked the area of her buttocks. He did not check her right elbow, her right knee, her right ankle. I also found it very, very unusual practice for a lawyer, in fact, I thought it bordered on the bizarre to be checking a complainant's injuries. If this was a police officer that did this to a complainant in an interview room, I can assure you he would be charged with sexual assault." (pp. 1936-1937)

The meeting with Crown counsel commenced at 8:00 A.M. on October 10, 1990. Such a meeting is a regular Wednesday morning occurrence. Usually in attendance are two representatives of the Crown office in Winnipeg, the Police Superintendent of Crime and the Inspectors of Crimes against persons and Crimes against property. There was only one Crown in attendance on this occasion. It was Senior Crown Attorney R.A. Finlayson, who had been with the Crown office since his articling days some fifteen years earlier. Other matters were disposed of and then Bell raised the G.H. situation with him. Present was Inspector R.T Dawson, the Inspector of Crimes against Property. Bell made it clear that an opinion was not being sought on whether a charge ought to be laid. The decision had already been made that some charge would be laid. The advice that Finlayson was asked to give, based on facts put to him by Bell, was whether the charge should be sexual assault or common assault. Bell says that the information he gave to Finlayson was as follows;

> "Mr. Commissioner, I explained to Mr. Finlayson that we were investigating a case that involved a local lawyer. I did not use Mr. Pollock's name.

> I told him that the case involved a complaint where a woman attended to the lawyer's office to discuss settlement of an Autopac claim, and that while in the lawyer's office, the complainant reported that the lawyer had asked her to come around beside his desk to discuss injuries that she had sustained in the accident; that she had been asked by the lawyer to take off her jacket. The lawyer had indicated he wanted to examine her injuries, and that whilst behind the desk, the lawyer had rubbed his hand up and down the woman's buttocks in the area between her buttocks, the crack between her buttocks. And I, at this point in time, told Mr. Finlayson of the periodical that I had read about the touching of the breast being interpreted as a simple assault. I asked him what the nature of the charge would be under the circumstances that I had described occurred in the lawyer's office." (pp. 1545-1546)

I believe that to be substantially what was communicated to Finlayson. I am satisfied, however, that the descriptive words used relating to the touching incident were that the lawyer "put his hands up the crack of her ass". Finlayson says that is what was told to him and Dawson and Bell agree that that could be so. Dawson's evidence on that point is revealing;

> Q. "Is it possible that the description of touching that was given to Mr. Finlayson was as he noted, 'the lawyer then put his hand up the crack of her ass,' in quotes.
>
> A. It's a possibility. It certainly would clarify the location, as crude as it might be. It would certainly leave no doubt in anyone's mind what we were talking about.
>
> Q. This was a discussion, private discussion?
>
> A. That's correct.
>
> Q. Between three individuals who knew each other well and met regularly?
>
> A. That's right.

Q. Language such as that, even though it seems crude in this forum, may well have been used in order to graphically depict what Inspector Bell believed had happened?

A. Yes, it wouldn't leave any doubt. I don't think it would leave any doubt in anyone's mind in this Courtroom what that would indicate, what area we are talking about, if it was used. It is possible.

Q. Yes. Now there is no doubt in your mind that he didn't say to him, the lawyer restricted his touching to the tailbone area or something like that.

A. No, there is no doubt in my mind, sir." (pp. 2199-2200)

Finlayson was not certain that it had been explained to him that the physical contact occurred in the course of an examination of injuries. I believe that that was part of the scenario put to him by Bell. Dawson also says that it was. In any event there is common ground that Finlayson's advice was;

> "...if those are all of the facts that we have, and there was no explanation as to the lawyer's behaviour, then the charge would be one of sexual assault that I would authorize." (p. 3724)

The decision was then immediately made. Pollock was to be arrested for sexual assault. I have already said that the officers had rejected the proposition of the touching occurring in the course of an examination of injuries as an explanation for Pollock's conduct and Finlayson, apparently, did not recognize that as a possible explanation. Not only was he given a brief and greatly abbreviated summary of what had occurred, but also I believe it reasonable to conclude that the " hand up the crack of her ass" description of the event would not then lead his mind to "the examination of injuries" explanation. It has to be appreciated that all he knew was what had just been communicated to him in a verbal way under circumstances where a conscious decision had been made that he would neither be advised of the name of the potential accused nor given the

opportunity of reading the file including the statements made by the complainant and the other potential witness. Kushneryk says that it was about 8:45 A.M. that he was advised by Bell and Toyne that Pollock was to be arrested and charged with sexual assault that morning. It should be noted that it was at 7:40 A.M. that morning, before the so-called Crown opinion had ever been sought, that Kushneryk had telephoned Winnipeg Free Press Reporter, Bruce Owen and told him that Pollock was to be arrested that morning for sexual assault. Immediately after 8:45 A.M., Kushneryk and Feener left for Pollock's law office to carry out their mission. At about that time, with Kushneryk and Feener on their way, Finlayson was told that Pollock was the suspect. He asked to see the complainant's statement but he was denied access to it.

Arrival at Pollock's office was soon after 9:00 A.M. Owen and Glenn Olsen, the photographer from the Winnipeg Free Press, were outside the building. Owen kept out of sight as the officers entered the office building. A clearly marked Free Press car was parked close to the entry of the building. Kushneryk and Feener say they did not see it. I can understand Feener having no recollection of it as its presence would not indicate anything to him. Kushneryk had not told him of his telephone call to Owen. I have great difficulty in believing Kushneryk was oblivious to the presence of the clearly marked car as he entered the building. He must have driven right by it at a very slow speed as he parked his car approximately three car lengths in front of it.

Kushneryk acknowledged that the first thing he did on entering Pollock's office was to place him under arrest. Kushneryk read Pollock his rights from the arrest card carried by him. It was made clear that Pollock was in police custody from that moment onwards. Kushneryk acknowledged that prior to arresting Pollock, he never gave him an opportunity to provide an explanation of what had occurred on October 3, 1990. Pollock had his dictaphone machine readily available and he switched it on. A consideration of the tape satisfies me that when told the alleged crime he had committed

was sexual assault, Pollock was at a complete loss to know when, where and on whom he was suspected of conducting himself in that way. He asked whether the incident at 12:10 in his office on October 3, 1990 was in the A.M. or P.M. He did not, initially, recognize the name of G. and he asked for her last name. As Pollock protested, he was reminded by Feener that the police had a complaint and they had to act on it. Pollock called his partner Robert Doyle in to his office.

Pollock described what was occurring as insane and Doyle pointed out to the police that what was being said by Pollock amounted to an absolute denial of the offense. When it was clear that Pollock had to leave for the Public Service building, Doyle asked if he could take Pollock to the Public Service Building and there, place him in the custody of the officers. He was told that this was not possible. Pollock's entry into the police car at approximately 9:30 with officers on either side of him has been well documented by the Free Press photograph taken by Olsen. Pollock was clearly agitated and annoyed at what was happening to him. During the exchange at his office, he asked the officers;

> "Do you know what you are doing to my reputation if the newspapers were to get an inkling of the fact that a policeman came down to my office and suggested for a moment that I had - that I had sexually - that I had sexually assaulted somebody. Do you know what that would do to my reputation?" (p. 339)

There was no response. Unknown to him, at that very moment, a reporter and photographer, tipped off by the chief arresting officer, were waiting outside for a picture and a story for publication in the Winnipeg Free Press. His agitation and anxiety continued at the Public Service Building. He was placed in an interview room at 9:42A.M. The allegations were again explained to him and he was asked if he wanted to say anything. He replied that this was "nonsense, absolute nonsense". He was taken before a

Magistrate and released on conditions, one being that he was to have no further contact with G.H. He stated while at the Magistrate's office that G.H. was his client and referred to a continuation of that relationship. In the existing emotional environment in which Pollock found himself, I am not critical of either his conduct or the words expressed by him.

CHAPTER V
AN ASSESSMENT OF THE INVESTIGATION AND THE ARREST

A. GENERAL

Quite apart from the question of guilt or innocence there are at least three reasons why the police should not have arrested Pollock on October 10, 1990. Firstly, at this point the investigation was incomplete. The arrest was premature and characterized by unseemly haste. Secondly, based on my analysis of the bail provisions of the Criminal Code, and the facts of this case as I have found them, there was no lawful authority for the arrest. That is because there was no reasonable basis prior to placing Pollock under arrest to believe that concerns under s. 495 (2) required an arrest. Thirdly, arresting Pollock was simply poor investigative technique.

With respect to these issues, David Whyte, a member of the Royal Canadian Mounted Police from 1952 until he retired in 1987 as Commanding Officer, R.C.M.P., Alberta, gave evidence as an experienced police officer with what I consider to be extensive expertise in the area of police investigations and arrests both in the field and as a police educator. He was, for instance, at one time, officer in charge of training at the Canadian Police College, Ottawa and at a later time Commanding Officer of the R.C.M.P. Training Academy in Regina. He impressed me greatly with his knowledge and keen sense of fairness. His answers to opening questions put to him such as;

1. What are the qualities of a good investigator?;
2. What is the object of any good police investigation?;
3. What is the role of the investigator in terms of gathering evidence?

should be preserved and become mandatory study material for police recruits in Winnipeg and beyond. Indeed his entire evidence, given in answering questions from Commission counsel, and the many counsel who cross examined him, should likewise be preserved and utilized.

B. THE HASTE OF THE INVESTIGATION

L.H. Reynolds, the Commissioner of Protection, Parks and Culture for the City of Winnipeg, was, I believe, most perceptive in his evaluation of what occurred surrounding the investigation and arrest. In expressing his views that the investigation was carried out with undue haste, he pointed out that the arrest took place within 23 hours from the time that the experienced principal investigator had come into contact with the case. There are, no doubt, many, many instances where that kind of speed is warranted. It was pointed out at the hearing that only about 2% of our population are breaking the law. Those 2% are a great burden to society and there are countless instances where even 23 hours between police involvement and arrest would be too long given the real potential for repetition of a serious crime, the possibility of flight or the likelihood of obstruction.

Unfortunately, hasty decisions are more frequently ill conceived than are well considered ones. Therefore, wherever possible, hasty decisions and actions are to be avoided. In this instance, the haste was indecent and in my judgment without an apparent need that is rooted either in effective law enforcement or administration of justice. Pollock is one of the 98%. He has never been in trouble with the law. The chief investigating officer acknowledged that he is a man of credibility in his community. Bell described him as a very high profile lawyer with an awful lot to lose in a situation of this kind. The Inspector recognized that his reputation and standing were at stake. Other police officers echoed the same thoughts. They seem to view this as justification for a summary arrest. In my view they were misguided and should have viewed these significant factors as reasons to act carefully.

Unfortunately, much of the investigation took place after the arrest when positions were already cast and objective analysis was no longer possible. At this point, if evidence was discovered discrediting the complaint, it would equally discredit the police force who had publicly committed themselves to a high profile charge.

Finally, important parts of the investigation could easily have been completed prior to the arrest, perhaps even within the morning of the arrest.

In a moment I will develop investigative techniques that I believe should have been employed here before moving to deprive Pollock of his liberty. But, first, I wish to indicate why the police say they moved with such haste. Bell, in the following evidence, expressed what a number of police witnesses said in a variety of ways on this issue:

> "As an investigator, I think it's very important that there is an element of surprise in dealing with suspects. I felt it possible that if word got around and Mr. Pollock eventually learned that we were subject, or he were subject of an investigation and we were planning to come see and/or arrest him, that he might either cook up a story, contact the complainant and try and dissuade her, or basically interfere with the investigation." (pp. 1657-1658)

Bell went on to say that he saw a strong dominant - subordinate relationship between Pollock and G.H. in that he was handling her legal affairs and had some control over her affairs. Bell then said;

> "I also perceived with Mr. Pollock's stature in the community that he had an awful lot to lose in this, he could become desperate and he could interfere with the complainant." (pp. 1660)

The police were concerned that one of the most likely ways that the element of surprise could be lost was if an expected letter from the Law Society asking for Pollock's explanation of G.H.'s complaint was to arrive at Pollock's office before they arrived to arrest him.

One of the areas of which I will, in a moment, be seen as highly critical, is not interviewing Pollock prior to arrest and giving him the opportunity to tell his story at a time when he remained a free man. That is a prime investigative technique that I believe should have been employed here. Kushneryk, echoing similar sentiments expressed by his police colleagues, said that if that opportunity had been given, Pollock could have contacted G.H. and tried to influence her to take her story back or tell the police to forget it. He agreed that what he was suggesting was that Pollock might have been prepared to obstruct justice in some way. At that point Kushneryk possessed no evidence of this propensity and Pollock's previous good character and knowledge of his legal obligations stood to the contrary. In a situation where the facts are as they are here, and the possible violation of obstruction of justice sections of the Criminal Code is as remote as it was here, I find it offensive to suggest as Kushneryk did. I feel the very same way about the explanations given by the police as to why they moved with such haste, particularly their perceived need to arrive at the office ahead of the expected letter from the Law Society. Witness Whyte, acknowledged that to have the letter arrive before the police might have lost, for the police, the element of surprise in dealing with Pollock. He agreed that to lose that surprise could have affected the quality of their investigation. I believe that is so, but surprise is not the only consideration. In my overall assessment of all of the facts existing here, I do not see it as a compelling reason for the police to have rushed to the office, as they did to immediately place Pollock under arrest. Moreover, the manner in which they conducted the arrest and the failure to communicate a legitimate and sincere interest in hearing Pollock's side of the story at the first reasonable opportunity, during the period of time they were in his office, renders this explanation specious and probably an ex post facto rationaization.

Essentially, all that was done before the arrest were the interviews of G.H. and her companion. The follow-up in other directions was

left for later. Interviews with the judge, the lawyer in Dauphin, the Human Rights Commission, and the Law Society were all left until after Pollock had been taken to police Headquarters and made his initial appearance before the Magistrate. Similarly, contact with G.H.'S doctor who had prescribed a number of nerve pills for her physical condition was left for later and only half heartedly pursued. The content of a statement from an officer of the Law Society obtained as part of the investigation after the arrest, was put to Kushneryk. He acknowledged its importance. The details which he learned from that letter and the subsequent interview of the Law Society's complaints paralegal about G.H. were significant. She described the fact that she had been drinking lately because of problems encountered with her young son. Kushneryk discovered that she was drinking at 4:00 P.M. on the afternoon that she delivered her written complaint. Surely, that information would have been relevant and helpful before the police made up their minds.

It is my view that, if more time had been taken, thought would have turned to whether there was evidence of the criminal intent necessary in a prosecution for sexual assault. I see no evidence of that being done. This was also the view of the expert witness Whyte. After explaining the significance of obtaining evidence as to criminal intent in the course of an investigation he expressed his view, on the basis of his reading of the transcripts of the evidence of officers Kapka, Hodgins, Ridley, Bettens, Kushneryk, Feener, Bell, Dawson. Toyne, Johnston and others;

> "...that no consideration was given to the essential ingredient of Mens rea, i.e. presence or the absence of sexually oriented intent behind the actions in question..." (p. 2885)

While witness Whyte's opinion of what constitutes the Mens rea of sexual assault may not be a precise statement of the law, I share his conclusion that police officers did not take into account the question of Mens rea at all. Whyte thought that the police were

hasty in concluding that a sexual assault occurred based solely on the actions of Mr. Pollock as described by the complainant. I am in complete agreement with him.

In summary, on the haste exhibited by the police - particularly the 23 hours between putting the experienced principal investigator on the case and the moment of arrest - my views accord entirely with those of Whyte as expressed in his answer to the following question;

> Q. "Now, what concerns, if any, were raised by your reading of the evidence as to the need to objectively evaluate the facts that have been presented to the police?
>
> A. Well, I think a great deal more attention should have been paid to that part of the investigation. Doing as much investigation as possible, and then sitting down as coolly and calmly as possible and saying, what do we have, what evidence is here? We have the story of a lady who feels she was offended in some way. We have the story of a suspect that she is complaining about. We have some background. Where are we? Where are we going? Do we in fact have a reasonable case?" (pp.2888-2889)

C. ARREST AND ITS EMPLOYMENT IN THIS INSTANCE

(1) CRIMINAL CODE POWERS OF ARREST

The power to arrest is a fundamental aspect of an effective criminal procedure system. It allows the State to deprive an individual of his or her liberty in order to ensure that the person will be compelled to attend court to answer to criminal charges. It also provides an opportunity for the police to conduct a variety of investigative procedures. It is however a procedure that takes place early in the criminal process, prior to any determination of guilt or innocence. As such, it is a power that must be exercised

with restraint in order to ensure a fair balance between effective law enforcement and respect for the liberty of the individual. The primary purpose of an arrest is to compel the attendance of the accused before a court in order to be dealt with according to law. The arrest sections of the Code are to be found in Part XVI entitled "Compelling Appearance of an Accused...". An arrest is only one of the methods that can effect this purpose. Section 496 of the Code also provides for the issuance of an appearance notice or under Section 507 (1)(b) a summons. These arrest sections were part of a series of amendments to the Code proclaimed in force January, 1972. The amendments, colloquially referred to as the Bail Reform Act were intended to implement many of the recommendations of the Ouimet Canadian Committee on Corrections Report concerning arrest and bail.

Prior to the Bail Reform Act, the only means of compelling appearance was by means of arrest or a summons. The police officer was entitled to exercise his or her discretion as to which was more appropriate. The Ouimet recommendation was to limit discretion in order to reduce the interference with liberty but the Code sections that were implemented were intended to represent a compromise. They seek to limit the power of arrest to those situations where it is "in the public interest". In commenting on the provisions of the Code regarding the appearance notice and summons the Law Reform Commission stated:

> "Since these methods are less invasive of the individual's liberty than arrest, it is clear that arrest is to be used where it is feared that the accused will not respond to a summons or appearance notice."

This policy is made clear by the wording of the sections which indicate that an appearance notice is to be used where the police officer has no reasonable grounds to believe that, if he does not arrest the person, the person will fail to attend in court. In addition to compelling appearance, Section 495 (2) of the Code also authorizes arrest when it is in the "public interest".

Though a term like "public interest" can never be defined with precision, the Code provides that it include, inter alia, the need to:

(1) establish the identity of the person,
(2) secure or preserve evidence of or relating to the offense, or
(3) prevent the continuation or repetition of the offense or the commission of another offense.

Potentially this language is broad enough to allow arrest for wide ranging reasons. For example, to request the accused participate in a line-up; to provide blood or hair samples; or to request a statement. The fact that the Code allows arrest in such circumstances does not mean that it compels it. Good police work still involves the need to weigh the risks and benefits of such a procedure.

The 1972 Code amendments dealt with release as well as arrest. The Bail Reform Act created a package that was designed to limit pre-trial detention. This policy is reflected not only in the judicial interim release provisions but also in the arrest provisions. By virtue of Section 495 a peace officer who has authority to arrest is directed not to arrest for certain less serious offenses. The section seeks to limit discretion in order to limit pre-trial detention. Even if an arrest is deemed necessary, the Code mandates that the arrest be terminated as soon as possible. The officer in charge of the police force may release for certain offenses. Following this the accused is entitled to appear before a justice and have the issue of release considered by an independent judicial officer. The offense of sexual assault is a hybrid or dual procedure offense - one that can proceed through the courts as a summary conviction matter or, alternatively, proceed by indictment - and by virtue of Section 495 (2)(b) of the Code, a peace officer is directed in mandatory terms not to arrest for such an offense unless the specified concerns exist. It is legally correct to say that for some purposes, a hybrid offense may be treated as a pure indictable offence until the Crown has made its

election. However, it is not appropriate to routinely apply this approch to the powers of arrest with respect to hybrid offenses. Parliament has specifically dealt with the powers of arrest in hybrid matters. The rule that specific legislation must override the general principle surely applies. Parliament intended that an accused charged with a hybrid offense be presumptively entitled to a summons or an appearance notice unless there was an evidentiary basis for concern under Section 495 (2). The discretion to arrest should only be exercised if it is clear that an arrest is necessary in the particular case. In other words, the arrest must not be based on a general policy and if the arrest is contemplated it must be appropriate to the evidence of the particular case. Each accused is entitled to an individual assessment as to whether arrest is necessary.

It is implicit in the language of the Code that a departure from the general policy not to arrest must be taken on a case by case basis. Any blanket policy would not be within the spirit of the legislation and could potentially lead to an arrest in violation of Section 9 of the Charter of Rights and Freedoms: Regina v. Pithart (1987), 34CCC 3d 150 (B.C.Co.Ct.); R. v. Labine (1987) 47 M.V.R. 25 (B.C.Co.Ct);Regina v. Faulkner (1988), 9 M.V.R. 2d (B.C.C.A.); Salhany, Arrest, Seizure and Interrogation Fifth Edition. (pp. 22-24, 44-46)

It must be pointed out that there is a distinction to be drawn between rigid and arbitrary policies which fetter discretion and guidelines which are to assist peace officers in the exercise of discretion. As I have said, the Code requires peace officers to consider each case separately when determining whether it is justifiable to arrest without warrant for a hybrid offense or summary conviction offense. This does not, however, preclude a police force establishing guidelines aimed at identifying matters to be considered in the exercise of discretion.

For example, domestic violence and sexual assault are matters of great concern for the Justice system. Often times the offenses in question are of a hybrid nature. In many instances, it is

appropriate that alleged offenders be arrested without warrant in order to prevent the repetition of the alleged offense or the commission of another offense. It would be of assistance to police officers to have reference to guidelines in order to assess whether arrest without warrant is appropriate in each particular case. Peace officers could be instructed to consider each individual case with reference to:

1. The passage of time since the alleged incident.
2. Whether further instances have occurred since the initial transaction.
3. Whether the parties are normally in close proximity to one another.
4. Whether the background of the alleged offender discloses a propensity for reinvolvement.

Peace officers could be instructed that these factors are to be addressed in the assessment of whether there are reasonable grounds to believe that the public interest requires arrest without warrant in a particular case. What is essential, however, is that if guidelines are to be established, they must be consistent with the Criminal Code and they must mandate that each case be treated individually.

Once it has been determined to make an arrest, that arrest may take place with or without warrant. There is no absolute requirement that the police obtain a warrant in non urgent situations. Regina v. Landry, (1986), 25 C.C.C. 3d 1 (S.C.C.). However, the fact that the law does not require a warrant does not mean that a policy in favour of warrants should not exist. There are advantages to warrants. A warrant creates expansive powers for the police. It will usually be directed to and can be executed by all police officers within the territorial jurisdiction. It can even be executed by these officers outside of the jurisdiction of appointment. A peace officer may arrest a person without warrant

when he or she has reasonable grounds to believe that a warrant is in effect within their jurisdiction. This power to arrest combined with modern police computer systems means that any police officer in Canada may effect an arrest without any personal knowledge of the case.

Another important advantage of obtaining a warrant is that an independent judicial officer will be able to objectively assess the need for a warrant as opposed to a summons. An independent assessment provides an important protection to the citizen which can only enhance respect for the system. Indeed it also provides protection for the police officer who effects the arrest since a third party has now endorsed the process.

Thus, there are some instances where warrantless arrests are needed for the due administration of justice. However, as Whyte indicated, the preferable procedure is to obtain a warrant unless there is a significant reason to conduct a warrantless arrest. Education combined with a policy that encourages arrest warrants should be sufficient to reduce the number of such arrests. Any policies that are formulated must comply with the Criminal code.

The fact that no written arrest policy existed and that senior officers from the City of Winnipeg were unable to state with precision or accuracy the law of arrest underscores the need for further education and training in this area.

(2) THE ARREST POLICY OF THE WINNIPEG POLICE DEPARTMENT IN SEXUAL ASSAULT

The arrest of Pollock was made pursuant to existing policy of the Winnipeg Police Department. It is clear that sexual assault under the Criminal Code is a hybrid or dual offence. The policy of the Department was stated by former Deputy Chief Johnston as follows;

Q. "...Is it the policy of the City of Winnipeg Police Department to arrest individuals in the cases of hybrid offences or offences which can be proceeded with either summarily or by indictment, as soon as the officers believe, based on the evidence of the complainant, that they have reasonable and probable grounds?

A. In the case of sexual assault, yes, that's correct.

Q. And that, as I understand it, is a general policy that is always followed no matter who the accused is; is that correct?

A. That is correct." (p. 2443)

Johnston, in a discussion of the policy, advised that if the investigator believes that the complainant appears to be credible, then the policy is to formulate the reasonable and probable grounds at that point, without interviewing the accused person. Toyne concurred that Pollock was arrested in accordance with this general policy of the Winnipeg Police Department, the explanation being, that in sexual assaults the arrest is to secure and preserve the evidence. He said that, in a case such as this, conditions must be put in place on the accused and that an arrest must proceed to make that possible. His concern was that the evidence be preserved in order to prevent the possible obstruction of justice through interference with the complainant. This applied, he said, in sexual assault cases where the victim and the accused are known to each other. Chief Stephen, under examination by McCaffrey, agreed with the breadth of the policy in the course of the following exchange;

Q. "Chief, on this arrest policy that you have told us about that's in place at the City of Winnipeg I just want to be sure that we all understand this.

Does it mean, in effect, that had this been you or I, instead of Harvey Pollock, for instance, and your secretary or somebody in your office accused you of rubbing their bum and a couple of your investigators got hold of that, you'd expect then, if they believed the secretary, you wouldn't be consulted, you'd be arrested; that's what it amounts to?

A. Under these same circumstances, that means exactly that, sir.

Q. And the same for me, if one of my secretaries went down to your station there -

A. Yes, sir.

Q. - and a couple of your boys interviewed her and they chose to believe her?

A. That's correct, sir.

Q. And that's their choice, is it, they can believe her or not, and depending on whether they do or not, I am going to be arrested?

A. That's correct." (p.3382)

While the evidence as to the application of the policy was not as consistent with respect to offenses other than sexual assault, it appears that this policy is applied by some senior police officers in a general way whenever someone is alleged to have committed any type of offense. Arrests pursuant to a general policy of this type are probably unlawful (Regina v. Pitheart, supra, Regina v. Faulkner, supra, Regina v. Labine, supra), and certainly violate the requirements for individual assessment. However, the facts of the Pollock case demonstrate another serious problem generated by this general arrest policy and that will now be discussed.

(3) POOR INVESTIGATIVE TECHNIQUES

Under this policy, no opportunity is given to an accused in a one-on-one situation, of putting his side of the matter onto the scales so that a balanced decision can be made before being led away by arresting officers. There may be individual cases which, when

looked at on their own facts, would warrant a decision being taken to proceed in that way. Sexual assault arising out of an environment of domestic violence may very often be such a situation where repetitions of the offense are a real concern. However, I must express my abhorrence that a generally law abiding citizen, such as Pollock, could, on the facts of the case told to the police by G.H., be caught within the web of such an inflexible policy. A tempered response from me to describe such a situation, is to say, that it borders on the outrageous. I cannot conceive, on the facts as the police knew them, that Pollock would not have been given the chance to provide his version of what occurred before being placed under arrest. Once again, I believe that my conclusion is supported by the expert witness, Whyte, and also by common sense. Whyte stated that a good investigative technique would certainly include obtaining Pollock's side of the story since that would be an important part of the investigative process. If they had heard Pollock's explanation, before deciding an arrest was appropriate, they would have had a greater opportunity to make the cool and calm assessment recommended by Whyte, while possessed of a complete set of facts. This would have involved putting the brakes on their drive to get him into custody but as I have already said, their haste was unwarranted.

Whether Pollock would have talked under such circumstances is, I acknowledge, an unknown. However, I believe, that the suggestion inherent in the following question, asked of Bell by Scurfield, is a most reasonable one, and one that many reasonable persons would have reacted to in a positive way, given the opportunity then available to provide an explanation while still possessed of their freedom that they had retained and enjoyed throughout their entire lives. In answering the question, Bell indicated he did not agree with the proposition being put to him;

Q. "Yes. But my question very simply is: Would you not agree with me that an individual with some stature or place in the community, that is to say any individual perhaps without a criminal record, is very likely to provide you, with an explanation if you give him an opportunity to provide a warned statement without arresting him?

A. No, I don't agree with you."

Toyne was of the view that placing a person under an arrest would not inhibit him then giving an explanation of his actions to the police notwithstanding that from that moment onwards his liberty was gone. I do not agree. Like Johnston, I entirely agree with the proposition put to that witness by Commission counsel in these terms;

> "Would you not agree that the moment you go and arrest somebody, you convey the message that your mind is made up at least? It is not like going and saying, we would like to hear what you have got to say about this; it is a much more formal thing and you are telegraphing to that person that you as a policeman have made up your mind on this thing..."(pp. 2711-2712)

To put it another way, in the words of Whyte, in making the approach to one in Pollock's position and giving the usual warning and caution and then asking whether the individual has anything to say without the loss of his liberty through arrest procedures, "there is still hope". A suspect will more readily conclude that his explanation will be given consideration. Once arrested, that hope is diminished. I agree entirely with Whyte that an approach of this nature as opposed to an arrest makes a difference to the atmosphere of the interview, since it alters the mindset of the person who is being interviewed.

My independent conclusions are consistent with the evidence on these issues given by witness Whyte. At the outset of his evidence Whyte filed a written statement which summarizes his observations as to the proper method of conducting an investigation and his observations with respect to this matter. While he expanded on what he said in the written document throughout his oral testimony, it is appropriate that I set forth the relevant points, made in his written document. All these points were expanded on in his evidence and I am in total agreement with his points some of which I enumerate hereafter:

1. With respect to interviewing witnesses or suspects, the key is to get an individual talking. Even an interview that begins with a denial is valuable. Moreover it can lead to further comments or investigations. Different approaches are appropriate for different suspects. A good investigator would normally plan which technique will elicit a statement. There is rarely any formal training as to techniques of interviewing. However, all instructors would normally emphasize the value of a statement, including a denial in good investigation. Therefore, every reasonable effort should be directed towards obtaining a statement.
2. Interviewing suspects and the decision to arrest must be evaluated separately. Interviews may take place without arrest. The purpose of an arrest is not to obtain a statement but to achieve the purposes set out in the Criminal Code. For example, to prevent flight, to secure evidence or prevent the continuation of an offense. You don't need to arrest in order to interview a suspect. There is no automatic connection between arrest and interviews.
3. A good investigator makes use of all reasonable alternatives to obtain evidence. It is not a good policy to ignore the opportunity to obtain evidence by

way of a statement made voluntarily and prior to arrest unless there are real and substantial concerns which mandate an arrest.

4. Arrest prior to a statement would be generally considered to prevent the continuation of an offense, to prevent an apprehended flight, or where the suspect demonstrated an unwillingness to cooperate. In other circumstances, a warned statement should be attempted prior to arrest. If unsuccessful, and reasonable and probable grounds exist, the suspect can still be arrested (by warrant or if urgent, without warrant) and another attempt to obtain a statement under charge and caution is possible and indeed advisable after the arrest.

5. An investigator may delay a decision as to a reasonable and probable grounds until his investigation is complete unless flight, continuation or obstruction is a real concern. In this regard, a bona fide concern should be based on evidence and not on speculation. With any credible citizen who had strong roots in the community, the investigation would normally be fully completed prior to formulating the grounds. Obviously, some investigations may be required to be done quickly and confidentially in order to avoid serving notice on the suspect. This is most important in cases where there is physical evidence yet to be gathered such as documentary evidence. Cases which turn on the verbal allegation of one person as against another raise less concerns once the complainant's story is recorded. Certainly the complainant can be advised not to communicate with the suspect and to contact officers if any communication occurs.

With particular reference to the Pollock case, Whyte's summary stated;

> "Clearly the interview of Mr. Pollock, by an experienced investigator, was an essential part of the investigation and clearly that interview could have been, and in my view should have been, undertaken prior to his formal arrest. If an arrest was still considered necessary to bring him under the control of the court, it could have been done with a great deal more tact, given that Mr. Pollock had some credibility in the community. In my view, he could have been invited to present himself at the police office, with his lawyer, immediately if that was imperative. A formal charge should have been laid and a warrant issued and executed at that time with conditional release to follow. Emergency arrest-without-warrant was absolutely unnecessary in this case."

It is obvious to me that the investigative techniques and principles described by the witness Whyte are rooted in common sense, logic and fairness. Obviously, the police officers involved in this investigation did not appreciate or chose not to employ these techniques and that caused predictable problems in this case. A careful reading of the evidence indicates that at no time in the initial arrest process was a serious effort made to get Mr. Pollock's side of the story. Even if one ignores the fact that the arrest was premature and counterproductive to the desired result, the initial meeting with the police officers does not demonstrate that any serious effort was made to obtain Pollock's side of the story. Even supposing such an effort were made after he was arrested, exposed to the media and taken down to the Public Safety Building, it is clear that the opportunity to obtain his side of the story, which any good investigator should have known was crucial, had been lost. It was inevitable from then onwards that the case had to be prosecuted without the benefit of the position of one of the two participants in the October 3, 1990 happening. In my view, this was preventable since I believe Pollock's testimony when he said that if he had been asked, he would have been happy to have had the police interview him. He said he would have been happy to sit down and talk to them and explain to them and show them his

documentation in the file, whatever would have helped them "...to dispel this terrible thing that was happening to my life. I could just see horrendous things happening." (p. 354)

D. THE POLICE - CROWN COUNSEL RELATIONSHIP

A consideration of this matter is best done in the context of evidence given by Whyte when enumerating concerns that became apparent to him by his reading of the evidence given at the Inquiry. The following evidence was given by him;

A. "...And by the same token, in my own view, I find it shocking that there wasn't a closer communication with the Crown at this point, particularly in a case that is obviously as sensitive as this one could become. I have always had the, I suppose the fortunate circumstances of working closely with Crown, not giving Crown the opportunity to decide whether or not a charge should be laid, because I believe strongly that is the police responsibility, but certainly working with Crown on the direction of an investigation, what evidence would Crown perceive was necessary that perhaps we had missed. A direct and open, comfortable working relationship with a Crown counsel on these matters, and I didn't see evidence of that happening here.

Q. If you were seeking an opinion, Sir, from the Crown, upon which you intended to rely, would you withhold any of the facts that were at your disposal and that had resulted from your investigation?

A. Not in the environment in which I am used to working, no.

Q. And why is that, sir?

A. Well, it is unfair to the Crown. I don't think you can expect a valid opinion as to the direction an investigation or a charge if you are withholding some of the evidence that you have gathered, because it is on that evidence that Crown is making its decision.

> There is evidence before the Commission that the police officers in question in speaking to the Crown in this case were not looking for a formal opinion from the Crown as to what to do, but looking for assistance in the wording of their charge. But I suggest to you that it went further than that. Because, indeed what they appeared to be doing was saying, should we be writing sexual assault or assault here.And that goes much further than simply deciding on the wording of a charge. You are asking for an opinion as to whether or not the circumstances support assault or a more serious type of assault."
> (pp. 2889-2890)

I consider that to be a perceptive and valid assessment of what went on here. My summary of that assessment is:

1. Shock at the absence of a closer communication with Crown counsel on a case as sensitive as this one could become. The absence of a direct, open and comfortable working relationship that was not at play in this instance.
2. Unfairness of withholding from the Crown facts at the disposal of the police investigators. If there is a withholding, you are not going to get a valid opinion because the Crown should have all the information the police have in order to arrive at the decision.
3. While the officers insisted that they wanted no assistance on whether to charge but only on whether the charge should be sexual assault or common assault, they were in reality, asking for an opinion as to whether or not the circumstances supported common assault or the more serious offense of sexual assault. There is no true distinction in most cases between asking for an opinion as to the proper charge and asking for an opinion as to whether to charge. In either event, a complete set of facts should be provided.

Unquestionably, there should be and must be a close working relationship between the Crown and police. The facts speak for themselves in indicating that this essential relationship was not present in October 1990. If such a relationship had been in place, all the facts would have been disclosed and that would have allowed for the preparation of a valid opinion. I have no doubt at all that in the course of preparing an opinion prior to a public arrest, it would have become apparent on a consideration of all of the evidence, that either there was no case of sexual assault here or at least that the investigation was incomplete. I would expect that in the cool and calmness of which Whyte spoke, reasonable police officers would also have had no difficulty in seeing it that way.

I now turn to the question of where responsibility rests for the depths to which relations between police and Crown had sunk by early October, 1990. I have concluded that the answer is to be found in an analysis of the evidence of the two officers, Toyne and Bell, who decided against seeking a proper Crown opinion and who withheld from Crown counsel the name of the potential accused and the police file or report. Based on their evidence their reasons were:

1. Because of past dealings with Assistant Deputy Minister Whitley, the belief was that a bona fide opinion would not have been forthcoming from the Crown. The past dealings relate to two incidents involving investigations of lawyers and judges. The first of these two instances is commonly referred to as Ticketgate and the second incident involved a lawyer by the name of Gindin. Both Bell and Toyne say they hold Whitley responsible for the failure to support charges in these instances.

2. An unbiased opinion on the nature of the charge was desired. This apparently was thought impossible where the potential accused was a lawyer.

Bell repeatedly spoke in derogatory terms of Whitley. He emphasized his mistrust of him and yet he acknowledged that he had no direct communication or involvement with him over the past fifteen years. He was, personally, in no way involved with either Ticketgate or the Gindin matter.

Toyne was vicious in his attack on Whitley. Toyne had no direct personal involvement in Ticketgate. He had no real contact with Whitley until February, 1990, when the Gindin matter was dealt with. Toyne was in charge of that investigation. Notwithstanding, relating to the 1988 events of Ticketgate, Toyne, based on hearsay, which he had never bothered to investigate personally, made this bold public indictment of Whitley;

> "I had serious concerns about the integrity of Mr. Whitley. He, for example, wouldn't charge a lawyer in the Ticketgate matter where the evidence warranted charges, and his reply was that he had been at her place for supper the week before. However, he was willing to charge and get a warrant for one of his senior Crowns where there was no evidence to warrant charges. So, I do have serious concerns. Whether he likes a person or dislikes a person seems to tend to decide whether we should charge." (p. 1960)

To senior police officers, the distinction between hearsay, speculation and solid evidence should be obvious. Equally, the responsibility to investigate serious allegations thoroughly and professionally before going public with them, should be apparent.

Dawson, who was in charge of the Ticketgate investigation, testified as to the two incidents cited by Toyne. So did Whitley and other Crown attorneys. Most have praise for Dangerfield who was lead counsel on Ticketgate. Bell said he respected and trusted Dangerfield. Dawson said he had no problem with him. Dangerfield was clearly in a position to know if the concerns with respect to Whitley were true.

Yet, Dangerfield, whose evidence I accept, satisfied me that Whitley played no improper role of any kind in either of the two Ticketgate incidents for which he has been indicted by Bell, Toyne, Dawson and other police officers. In the first example, Whitley passed the file to Dangerfield to handle because of his friendship with the lawyer in question. In the case of the latter incident, Dangerfield denied that Whitley took an unusually aggressive stance and said that at the time of the assessment meeting, sufficient evidence was not available to decide the category into which the Crown attorney in question belonged. The negative view that Dawson expressed of Whitley's involvement in these two situations was erroneous and one that I do not accept, given the clear explanation provided by Dangerfield. Furthermore, Dawson's conclusions were, at least in part, based on unsubstantiated speculation. In particular, Dawson concluded that Whitley had put undue pressure on Dangerfield not to charge the lawyer with whom Whitley had dinner when Dangerfield's clear and unequivocal evidence was that no such pressure was ever exerted and he decided not to charge the lawyer along with many others, based on an objective formula. The fact is, Toyne and Bell, who were not present, and who did not bother to contact Dangerfield, were prepared to make this public indictment of Whitley at great cost to his reputation, I am sure, if it is allowed to stand.

Nor is Toyne's attack on Whitley for the latter's role in the Gindin matter any more credible. I have already related the facts that gave rise to the differences between police and Crown on that occasion. Dangerfield was every bit as much part of the position taken by the Crown as was Whitley. Furthermore, in my judgment, the position the Crown took on the matter was one hundred percent correct. I have already made reference to my acceptance of Whyte's view that in asking for the wording of a charge, what is really being asked for is an opinion as to whether or not the circumstances support the contemplated charge. We were told that the Gindin matter arose in the midst of what was described as "a very grisly murder". Yet, notwithstanding the unknowns that existed at the time of requesting the wording of a charge, the police apparently expected quick verbal advice, off the cuff so to speak, involving a serious and complex charge, as a conspiracy always is, alleging

obstruction of justice against an officer of the court. The Crown would have been irresponsible in my opinion to react other than the way it did. I say that with full knowledge that Gindin was then in custody. The anger and hostility is apparent in the following extract from Toyne's evidence where he addresses the deadlock with the Crown in the Gindin matter;

Q. "That's not my question. Do you not think it's appropriate for a Crown Attorney to ask for the file when he's been requested to draft the proper wording of the charge?

A. I could see it being appropriate to review the file if he wanted to give us the proper wording, That was not the dispute. The dispute was if we wanted an opinion, they wanted the file.

Q. And you said, we don't want an opinion so you are not getting the file, or words to that effect?

A. Basically. We weren't seeking an opinion.

Q, So you weren't going to give them the file?

A. Well, if it got to that point, no, we wouldn't have given them the file, we were not seeking an opinion.

Q. Because it was a lawyer?

A. At this point, yes, because it was a lawyer, because we were told to immediately release him. And when I was told to immediately release him, my reaction was, what is going to happen to this file?

Q. If it had been a school teacher or a laborer and they told you to immediately release, would you have taken the same position?

A. They wouldn't have told us to immediately release if it had been a laborer.

Q. How do you know that?

A. He had the man in the interview room.

Q. How do you know that?

A. He was being processed.

Q How do you know they wouldn't have told you to release him had it been a school teacher or a laborer.

A. Well, I have been a policeman for 25 years, and all the time I have had people in the interview room, the Crowns have never ever instructed me to release them and send them the file.

Q. So you assumed that it was because he was a lawyer they said to release him?

A. That's what I based my assumption on, yes, sir." (pp. 2041-2043)

The latter reference parallels views held by Bell as expressed when speaking to the Pollock matter:

Q "What was the reason you were not going to give the lawyer's name to the Crown?

A. We wanted unbiased advice from the Crown Attorney, as a result of the feelings we had in the past. We felt that if we were to give Mr. Pollock's name to Mr. Finlayson, from our knowledge of past dealings with the Justice Department, that in all likelihood Mr. Finlayson would not have given us the advice we sought. I don't have a problem with that, I am not saying that to be against Mr. Finlayson. I just - I did not anticipate that he would be in a position to give us the advice." (pp. 1780-1781)

This is an appropriate point to conclude the consideration of the reasons that prompted Bell and Toyne to withhold Pollock's name and the file from Finlayson. The underpinning for each of the reasons has been set out. The fact of the matter is the reasons lack any substance whatsoever. With respect to the first reason, the analysis just made of the Ticketgate and Gindin matters show that mistrust of Whitley was baseless. No factual basis for the second reason, that an unbiased opinion from the Crown in a case involving a lawyer would be impossible, has been shown to exist. In fact the evidence before me indicated that several lawyers have indeed been charged with the assistance of a Crown opinion over the past few years.

The decision to stay the charges in Ticketg te has been a ghost haunting the Winnipeg Police headquarters for the last three years. While I have focussed on Bell and Toyne because of their role as decision makers in the late afternoon of October 9, 1990, other officers such as Dawson and Johnston were equally unrelenting in both their attack on Whitley and their disdain for the ultimate result in Ticketgate. "Disgraceful" is how Johnston described it.

Johnston continued to harbor concerns with respect to the video of the strike scene at Super Value in June 1987. Ticketgate of 1988 revived that incident and as I have already noted, he took very strong exception to Whitley not supporting the police on that matter. In acknowledging his antagonism toward Whitley, he said Crown counsel in the Province were generally excellent and that they work in spite of Whitley. This antagonism by the head of the Crime Division, clearly, filtered down through the ranks.

When it comes to the Justice system, judges and lawyers are no different than Caesar's wife. They must strive at all times to be above suspicion. There always have been and there always will be instances where the entry of a stay is the appropriate course of action to take. But where a stay is ordered - not because of insufficient evidence or some similar valid reason - but for the kind of reason that existed in Ticketgate, then when members of the legal profession who are principal operatives in the justice system are the beneficiaries of the stay, then the kind of ongoing fallout that has existed here must be expected. The benefit that accrued to the members of the profession who faced or could have faced charges arising out of Ticketgate caused those beneficiaries to be seen as something less than the standard Caesar set for his wife. To put it bluntly, public suspicion was aroused. The Honourable Mr. Dewar found "strong responsible opinion...condemning the decision (to stay)". I find that it has created an environment of intense anger with overtones of hatred permeating the Winnipeg Police community. Ticketgate is over. The decision to stay is irreversible and it

is time for the police community to put it behind it and get on with business as usual. Those who cannot do that should retire, resign or be assigned to less sensitive jobs.

I conclude this portion of my report by saying that the attack on Whitley was unfair, unjustified and without any merit whatever. Whitley was one of a group, and not even the most senior member of the group, who recommended the stay in Ticketgate to the Attorney General. He, in turn, accepted the advice and made the announcement of the stay. In Gindin, Whitley was not the main decision maker and in any event the decision made was entirely correct. Whitley is no longer a line Crown attorney. Clearly, he has an academic, policy oriented approach to his work. Perhaps that is an attribute without significant appreciation in the working police environment that I have described. Perhaps he is simply not liked by some of the senior police officers he deals with because of that fact. Even if that is so - it offers no rational explanation for the attack on him. Toyne and Bell based their allegations on gossip and innuendo. I have found that Dawson's interpretation of the events is unsupportable. In short, these senior police officers totally lacked reasonable and probable grounds for their sweeping allegations about Whitley which bordered on the scandalous.

If Bell and Toyne had turned the Pollock file over to the Crown for a considered opinion, I cannot conceive how they ever would have received a green light from the Crown office. Further, there is absolutely no evidence to support their contention that an opinion would never have been forthcoming and the file would have been held for an inordinately long period of time. I would have expected, with the opportunity for full consideration and with the directing of the mind to a consideration of such matters as mens rea, the idea of a prosecution for sexual assault on the facts that existed here would have received no encouragement from the Crown office. Thoughtful study, consideration and reflection was bound to reveal that something different occurred here than the placing of a hand "up the crack of her ass".

I am mindful of the conclusion expressed by both Finlayson and Miller. They apparently endorsed the charge. However, neither had the opportunity to objectively review the matter before proceedings became high profile across Manitoba and beyond. I believe that they both could have carried out a more critical review of the facts than they did. However, I am mindful of the fact that the police investigation and the high degree of public interest imposed practical limitations on the normal review process. The information which the police provided to the Crown was restricted to material that supported the police decision to charge. No real attempt to identify problem areas took place. Moreover, the arrest process effectively precluded any opportunity to get Mr. Pollock's side of the story which, I believe, was crucial. The decision to stay proceedings in the face of the highly publicized case that this immediately became brings to bear very different pressures than does a decision not to lay a charge. I am forced to conclude that the police officers involved in the Pollock matter were only too aware of the impact an arrest would have on the Crown's practical ability to stay this charge. The Crown would never have been able to convince the police with the mindset and commitment they had, to acknowledge that a stay of the charges was appropriate prior to trial. A public relations war would have followed. Thus, while the Crown attorneys involved should have reviewed these charges more critically, I find that the police officers who put them in the position of not having an opportunity to review the charges in a rational and objective forum before the charge was laid, must bear most of the responsibility for the fiasco that occurred. In summary, the analysis of the reasons for Bell and Toyne refusing to give the Crown the information to which it was entitled to in order to properly advise them on the Pollock matter satisfies me that the Winnipeg Police Department must accept major responsibility for the unsatisfactory state of relations existing in October, 1990. I have meticulously searched the evidence to see if any other possible reason has been advanced for the brutalizing of Whitley that occurred from the witness stand. I find absolutely nothing. Nor, as I have said, does a factual basis exist to support the suggestion that an unbiased opinion was impossible.

With the reasons advanced being groundless, and no others existing, what conclusion is to be reached for the existence of this state of affairs? I will answer that question in the concluding portion of this report.

CHAPTER VI
THE TRIAL AND THE STAY

A. THE ACTIONS OF CROWN COUNSEL

I have quoted extensively from the description given by G.H. at Pollock's sexual assault trial as well as from what Britton said he saw her demonstrate on that occasion. By the time G.H. left the witness stand, Britton was of the view that there was neither any evidence of sexual assault before the court nor did he have any other evidence available that went to the proof of such an assault having occurred. I believe he was correct in that conclusion.

Britton is a Crown counsel attached to the Crown office in Brandon. I believe it was a most appropriate decision to assign the case to counsel outside Winnipeg. Britton did not have a personal relationship with any of the players involved in this Winnipeg drama, including Pollock and the police officers. I see no need to have gone outside the Province for prosecutorial services. Feener described the case as "...a very simple sexual assault". There was no disagreement with that proposition at the Inquiry. Feener had what, I believe, was the mistaken notion that because Pollock was "a prominent man" rather than "an ordinary citizen" something more than a junior counsel who practices at docket court level was required to prosecute Pollock notwithstanding that a junior counsel would be quite acceptable to prosecute "an ordinary citizen". Bell thought a senior Crown from outside the Province should have been brought in to prosecute the case.

Britton served his articles with the Attorney General in Brandon in 1981-1982. Upon receiving his call to the Bar he entered private practice with a Brandon law firm and practiced extensively in criminal law for the next six years. He returned to the Crown office in October 1988 and has been there since that time handling a wide variety of cases right through to murder. I have no criticism whatever of his choice for the Pollock assignment. It was quite a proper one. He was an impressive witness. He struck me as a self confident individual possessed of good judgment and intellect.

I will express my views later on his performance on December 18 and 19, 1990. In a memorandum that he never expected to be made public, he expressed surprise at his selection for this task in a rather unusual way but his initial reaction to his selection by headquarters was understandable and I attach no significance whatever to that initial reaction.

What did Britton do when he was satisfied that he had not and could not prove sexual assault? He certainly felt G.H. had not communicated to the court what he had taken from his two previous interviews with her. But this could not have come as a great shock to him. He is the one Crown counsel who had some misgivings about the quality of the case almost from the time it was first handed to him. If I have any criticism of Britton, it is that he did not pursue those misgivings when they arose, but, he explained, "this file had come to me not for me to prepare an opinion on, but to prosecute". He was aware that it had gone to Senior Management Committee in headquarters and he emphasized that he saw his responsibility to prosecute and not to provide a legal opinion. Too bad. If, either it had gone to him for an opinion or if he had thought it was his place to provide one, this whole matter might well have been stopped at that point. He said he realized, almost from the start, that what he was taking forward was "a weak case of sexual assault...not a strong case". He thought it was "an arguable case...a prima facie case". That is why he went forward with it.

In mid-afternoon of December 18, 1990, Britton sought and obtained an overnight adjournment. He expressed his concerns to Miller and Whitley. He went with Miller and Whitley to the office of Deputy Attorney General Garson who wanted an explanation of what had gone on during the day in light of a telephone call he had received from Johnston, who communicated to Garson that the police had concerns that there was a deliberate attempt to throw the case in order to embarrass the police department. When Britton left for the day, he had decided to proceed with common assault.

He had meetings again the next morning with Whitley and Miller and at Whitley's suggestion he met with Dangerfield in order to gain the benefit of the wisdom and counsel of this senior experienced prosecutor. All those superiors with whom Britton dealt, while as helpful to him as they could be, left the ultimate decision as to what should be done, to him as the prosecutor charged with carriage of the case. I do not fault his superiors for taking that position.

I have already indicated what Britton did when appearing before the court on the morning of December 19, 1990. I have already expressed my agreement with the course he followed that morning. In my judgment, he handled himself in a most principled way and one that does honour and credit to the role of Crown counsel. Somewhat lengthy though it may be, I believe the reasons he expressed for the position he took, both with respect to sexual assault and common assault should be recorded for all who are interested to read so there will be absolutely no doubt as to what was communicated to the court and what the reasons were for that communication;

> Q. "We have heard evidence that the next morning when you arrived at the Woodsworth Building in order to proceed in the second day of the trial that you had made a decision to enter a stay of proceedings. Can you tell us, sir, how you arrived at that decision?
>
> A. Well, after I went to bed, I had, as I indicated in the memorandum that I prepared for this case, I had a restless night of sleep. I did not believe that the Crown had proven any criminal intent or maliciousness on the part of the defendant. I guess the bottom line was in all the cases that I defended or prosecuted, you are attempting to establish the culpability of the defendant. He had not done this in this case. He could not do it. It seemed to me wrong to prosecute, to continue prosecution on either sexual assault or common assault - sorry, on common assault, because we had already agreed it was going down to common assault.

It didn't even seem to me there was any intent, that I had proven any intent of common assault. And it seemed to me what I was really doing was choosing between the lesser of two evils. I mean, I remember this going through my mind: A prosecutor should never choose between the lesser of two evils. That isn't a decision you should even think about. If you are confronted with that, you should choose neither, and that's how I felt about this case.

Q. What did you mean by the two evils in this case?

A. Well, I hadn't proved - I certainly hadn't proved the sexual assault. The complainant had not touched herself in a sexual area. It wasn't a sexual assault. The evidence, in the circumstances of the case, showed quite unequivocably in my mind and were only consistent with the fact that the defendant had touched the complainant in the course of examining her injury which she had received in a motor vehicle accident which he was acting for her on. I felt that was probably - was an imprudent thing to do. It wasn't something that was recommended, but to me it was not a criminal offense. He was not intentionally touching her without her consent. He therefore was not guilty of a crime and not to be prosecuted further...

Q. Now, my understanding, the evidence you have given is that before you went home that night you had more or less reached an agreement with Mr. Whitley, Mr. Miller, and, indeed, in the presence of Mr. Garson to proceed on a common assault?

A. That's correct.

Q. Clearly the evidence hasn't changed from December 18th to the morning of December 19th. Can you tell us, sir, why you changed your mind and decided to stay the charge completely?

A. Just on reflection, I mean I had more time to reflect upon it. I remember in the meeting that we had with Mr. Miller and Mr. Whitley, Mr. Whitley saying, well - I was giving my description of what had happened. I recall Mr. Whitley saying at one point: 'Well, he touched her. That's an assault.' And I agreed at the time; but then, I reflected on the issue, and I didn't agree that it was an assault. Every touching is not an assault. People touch one another in the course of conduct of their daily affairs all the time. That isn't an assault. I mean, you touch someone and you shake hands with them, and you put your hand on their shoulder. That is not an assault. An assault is only an intentional application of force or can be an intentional application of force. It doesn't have to be hit or slap or anything like that. It could have been an assault, but there must be criminal intent. There must be some intention to touch the person without their consent. That was absent in this case. All of the circumstances were only consistent with defendant touching the complainant in the course of examining her for her - to examine the injury on the back of her spine. He in my judgment did not have criminal intent." (pp. 4100-4105)

Lest there be any doubt, my expression of approval of what Britton did in court that morning includes his decision not to proceed with common assault. I agree with the substance of his answer quoted immediately above, but, also, a decision at the outset to engage the weight of the criminal law on such facts in pursuit of a conviction of common assault would never, ever have been made in any jurisdiction of our country, and, to require Pollock to continue to defend himself on a charge of common assault just because he was then before the court on a charge of sexual assault that had just collapsed would, I believe, have been irresponsible.

No rational human being with even a peripheral knowledge of criminal law would ever, at the outset, have given the green light to a common assault charge on the facts that Britton was faced with when the complainant left the stand. There is serious crime in our communities which requires the full attention of law enforcement authorities. These facts did not qualify as such.

B. THE POLICE REACTION TO THE EVENTS OF DECEMBER 18-19, 1990

Toyne assigned Dawson to attend court on December 18, 1990 and watch the proceedings because he had concern over the way the matter was being handled by the Justice Department. Dawson reported inter alia that:

1. It was a mismatch from the start. Crown counsel had been a Crown for some two years and defense counsel is known as one of the most experienced in the City of Winnipeg.
2. Britton appeared nervous and unsure of himself from the beginning and was very intimidated by the pressure he was under. He appeared subservient and deferential to defense counsel.
3. Britton made no effort to describe to the court where G.H. had been touched. This was left to the defense later on.
4. Defense counsel was "putting words" into the complainant's mouth.
5. A high profile Crown such as Bruce Miller should have handled the case from day one.
6. There was a lack of redirect evidence by the Crown. Britton should have asked questions on re-examination of G.H. by clarifying how and where the touching occurred.

Toyne and Johnston both met with Dawson shortly after the closing of court on December 18,1990 and received a verbal report from him. Toyne said the report indicated that the Crown was intimidated, made several errors and was generally incompetent in putting the strong evidence of touching on the record. Britton reportedly glanced over to defense counsel "sort of indicating should I stand up and ask the question, or obviously wanting to know if it was O.K. if he could ask a question". Johnston described his report from Dawson this way;

> "He advised me that Mr. Britton seemed out of his depth. He seemed to be intimidated. He described Mr. McCaffrey's performance as fencing with an unarmed man. And he was just - he seemed confused, and in the middle of it all it seemed that he just gave up, in Inspector Dawson's words, he had just given up". (p. 2491)

Johnston, with the concurrence of Stephen, phoned to the Deputy Attorney General to express his concerns. Some criticism has been made over the alleged impropriety of such a phone call. I do not agree. If there were concerns of this kind, the relationship between Crown and police should allow for the expression of viewpoints in such a situation. This is not to say that I agree with the message that Johnston was communicating to the Deputy Attorney General. That message is best described as garbage. In communicating the import of what Dawson had reported, he spoke of Britton "floundering" in the courtroom. His allegation that Britton "would roll over and play dead and stay the charge" was offensive. When analyzed, that suggestion implies that Crown attorneys may have been prepared to obstruct Justice with the sole motive of embarrassing the police. This allegation was repeated at the Inquiry by Toyne and Bell but no evidence was advanced to lend credibility to the accusation. The Deputy Attorney General, after investigating the matter, reported back that the problem was an evidentiary one relating to the nature of the touching. In my judgment, that was a correct response and the Deputy Attorney General properly communicated it back to the police.

Other concerns and comments expressed by the police about the Crown's handling of the case include:

1. Kushneryk's response to Britton's thought at the close of court on December 18th that a stay could be the appropriate course to follow, that "this is shit".
2. Johnston, on the basis of what had been reported to him, made the observation that Britton "is not well-experienced in the court process".
3 Bell was of the view that Britton had been "outgunned".
4. Toyne held the belief that G.H. was not prepared for court and he said the transcripts of the trial bear this out. Even though he made this allegation he admitted that Britton had met twice with G.H. prior to trial and that that level of preparation was unusually high, particularly, in a touching kind of sexual assault case.
6. Toyne, having placed responsibility for what occurred in the courtroom on the shoulders of Britton, then indicated that the responsibility for Britton's selection must rest with Whitley.

Of great annoyance to the police was the fact that they were not called to testify and put on the record what they had done during the course of the investigation and to explain why they had acted as they did. Kushneryk had telephoned Britton in advance of trial and suggested that the other witnesses who had been subpoenaed should precede G.H. on the witness stand. Dawson expressed his viewpoint in the following way;

Q. "Well, but the other witnesses were in the nature of individuals who had received complaints from this witness.

A. That's right.

Q. You have already agreed with me that there are special laws which restrict the admission of that evidence?

A. But I think what became important there, was to show for the administration of justice that the police, and particularly Kathy Hodgins hadn't done some scandalous thing, and instructing the complainant to do something she didn't want to do or shouldn't have done.

Q. It was important I understand from the police point of view then to call some of this evidence not necessarily to prove some element of the case which was being denied but to simply demonstrate that the police had not somehow perverted the course of justice?

A. That's right.

Q. That was a concern you had?

A. Certainly". (pp. 2246-2247)

Toyne expressed it this way;

Q. "What you meant by that was that you had wanted the charge to continue so that the police could explain what they had done by way of investigation; is that right? Did I understand you correctly?

A. Yes, sir. Our officers don't have a public forum other than giving evidence in court, to explain their actions.

Q. So, because the police had been subject to so much criticism in this case, you wanted to use the public forum of the court to explain their actions?

A. I felt that this was the only way our evidence could come out, yes, sir, that we were not on a vendetta.

Q. You thought that that would be an appropriate use of the court system?

A. I felt that we had gathered evidence, and I honestly felt that the evidence should be presented in Court.

Q. But, did you feel that it was appropriate for the court system to be used as a forum for explaining the police actions?

A. Well, I don't know whether it would be appropriate. I don't know what other forum we had. We were involved in a Court case; and unless our officers were given the opportunity to give their evidence, yes, sir, we would be as if we were out on a witch hunt.

Q. So you wanted to use that forum to show that you weren't out on a witch hunt?

A. I believed we had a good case and I thought it should proceed, yes, sir." (pp. 1999 2001)

When Britton was called to give evidence he answered all of these concerns. His explanation on why he did not re-examine G.H. was right on target;

> "I didn't feel that I could re-examine her on what was the central problem with my case, and that was that because the issue of where she had been touched was raised on direct examination, it was not a new issue that had been raised on cross-examination, and it would be improper for me to raise that issue on re-examination." (pp.4086-4087)

Britton might have added that he would have anticipated both an objection from defense counsel and a ruling from the court against him. Those two events would have undoubtedly occurred had he followed the course the police desired.He told of his meeting with Kushneryk and Dawson immediately after the close of Court on December 18, 1990. He described what occurred in the following way and I am in full agreement with the conclusions he reached;

Q. "What, if anything, did you tell them was your intention at that point in time?

A. I told them that in my opinion she had not testified to sexual assault or a common assault and that in my opinion the charge ought to be stayed.

Q. What was their reaction to that?

A. They were opposed to that?

Q. How strongly was their opposition voiced?

A. Very strongly. Vehemently.

Q. Can you give me some examples of what Sergeant Kushneryk may have said to you?

A. What I recall vividly was after a few reasons as to why the charge ought not to be stayed, he said to me: "This is shit, Matthew. This is shit, Matthew,' and he continued saying that a number of times. I think we met between 20 minutes and half an hour and discussed all the issues; but he continued to say; 'This is shit Matthew'.

Q. Now, what reasons, if any, did he give you why it shouldn't be stayed? You mentioned he had given you some reasons?

A. He said that the police would look bad. That was one of the big factors, the police would look bad. To me, that was not a relevant consideration on whether or not we should proceed with the trial." (pp. 4089-4090)

I also agree with, and accept his answers to the following questions;

Q. "Finally, sir, was your ultimate decision to enter a stay of proceedings influenced in any way by the public profile of this case or intimidation that you felt through the process that had taken place in the first day of the trial?

A. I didn't feel intimidated whatsoever with respect to the conduct of the case. What I found intimidating was the prospect of going back into Court without a case. That I found to be an intimidating prospect. I did feel under pressure from the police in the sense of what they had said to me. They hadn't made any improper suggestions to me, but they obviously felt that the case should be proceeded with. They did not in my opinion give convincing legal reasons, and I felt that it was my responsibility to make the legal decisions..." (pp. 4111-4112)

Q. "And you told us about meeting with the complainant on two occasions. How would you describe your relationship with the complainant?

A. Very, very good. She seemed to have confidence in me. I could detect that she was very nervous. And I tried to reassure her. I recall telling her that if she ever wanted to get ahold of me, she could call me. I gave her my office phone number, I gave her my home phone number. I wanted her to feel that if she had a concern, or wanted to talk to me about anything, she should call me. And she exercised that privilege." (pp. 4132-4133)

Britton said that on the second occasion that he met with G.H. to prepare her for trial, the rehearsal had involved Kushneryk playing the role of defense counsel. He also told of Kushneryk, with his concurrence, taking G.H. to the courtroom before the trial so that she would see the environment in which she would be required to testify. Britton said "we prepared her for it". I believe him and commend him for the diligence shown in that preparation. As for his failure to call police evidence after the complainant's testimony at the Inquiry, suffice it to say that I heard all that potential evidence and I agree with Britton that it would have added nothing to the strength of the Crown's case against Pollock. A criminal trial should never be used as a public relations exercise for the police or anyone else at the expense of an accused who the Crown has properly determined should not be convicted.

As far as I am concerned, the litany of complaints about his performance that the police were attempting to hang on him, was a "bum rap". I consider him to be an ethical and competent attorney, learned in the criminal law and the practice of it. He, like Whitley, has a future about which to be concerned. Here again, I believe it is important for me to set the record straight. He is a credit to the Department of Justice and the public of Manitoba will be well served if he remains there.

Again, I am left with a question that I must return later to answer and that is, what is the reason for the actions and conduct of the police on December 18th and 19th? These were abnormal actions and conduct by police officials. They, like the Crown, are committed to a dispassionate role in the important function of law enforcement that they play in the administration of justice. Their conduct on this occasion was anything but dispassionate. Rather, it was highly emotional, sprinkled with liberal doses of hype and paranoia. Why?

CHAPTER VII
THE AFTERMATH OF THE STAY

The day following the entering of the stay, Mayor William Norrie of the City of Winnipeg requested Reynolds to prepare a report on the investigation, arrest and trial of Pollock. He asked for the report by the first weekend in January. Reynolds set to work on the task immediately. He made his request for information to Acting Chief Johnston. Chief Stephen had left the city on vacation at about that time. Notwithstanding that this assignment had to be carried out over the holiday season, the Police Department gave its full cooperation with the result that Reynolds was able to meet his deadline. Stephen told the Inquiry that he conducted his own review of the whole Pollock matter following his return in early January. Both Reynolds and the Chief relied entirely on the reports of those police officers who were the potential subjects of criticism. Within those reports was a review of the investigation dated December 27, 1990, by Superintendent Bromley. Neither Reynolds, the Chief or Bromley spoke to the complainant, Pollock or the Crown attorneys involved. Bromley was put in the unenviable position of being asked to review the conduct of senior police officers, some of whom were his equal or of senior officer rank. In any case, the officers were part of the same fraternity. The result was a report absent of criticism of his police colleagues. It is surprising that the Chief appears to have adopted the Bromley report in an uncritical fashion. As a former superintendent of the Crime Division and an experienced detective, the glaring deficiencies in judgment and investigative technique should have been apparent even to someone reading the rationalizations contained in the reports. The deficiencies were quickly apparent to Reynolds. He, despite his lack of police background and newness to the job, identified the essential problems which gave rise to the Pollock affair. His conclusions stand in stark contrast to the Chief who concluded that this was "one of the most thorough investigations I have ever seen".

The Chief continued to maintain pubicly that this was an investigation "...conducted... in a professional manner in accordance with the Winnipeg Police Department" although he did concede at the Inquiry that proper procedure would have included doing the bulk of the investigation before the arrest and not afterwards. It is difficult to reconcile this contradiction unless a thorough and professional investigation is characterized by the volume of work done and not by the quality or timing of the work done.

As a result of Reynolds' concerns, most of which I have endorsed, he recommended inter alia;

1 The immediate restructuring of the Crime Division.
2. For reasons stated, the retirement of the head of the Crime division.
3. The transfer of Toyne, Bell and Dawson out of the Crime division into other branches of the Police Department.

In my opinion these were perceptive changes. Reynolds stated that he made the first recommendation because the working relationship of the Crime Division and the Justice Department seemed to be untenable at that point in time. The Mayor instructed Reynolds that he, in consultation with Chief Commissioner Frost, was to deal with the administrative actions required to rectify any problems. With respect to other matters such as the policy of laying charges, the Mayor would deal directly with the Minister of Justice. Deputy Chief Johnston retired immediately after a meeting he had with the two Commissioners on January 14, 1991. Reynolds instructed the Chief to carry out the three transfers and he did so on January 17, 1991. Based on the Chief's lack of insight into the problem that existed in the Crime Division, and his "100 percent" endorsement of the investigative performance of that division on this occasion, I am satisfied that he would not have been motivated into action if left on his own.

He did, however, follow the direction of Reynolds with respect to the three officers. The three officers filed grievances with respect to their transfers. A meeting between senior City officials and the Senior Police Officers Association was held on the evening of March 27, 1991, to resolve the problem. Present on that occasion were Chief Stephen, Reynolds, Marvin Samphir of the City of Winnipeg Law Department, Ken Williams of the Senior Police Officers Association and counsel, Mel Myers, who represented the Association and its members including Toyne, Bell and Dawson at the Inquiry. As a result of the meeting, the transfer of the three officers was upheld and they remain outside the Crime Division in other employment with the Police Department. However, they gained certain material benefits in the resolution process. Dawson, whose involvement related to his presence at the meeting with Finlayson and then, later, reporting back on the courtroom events of December 18 and 19, 1990, was given assurances that he would be transferred back to the Crime Division at the end of six months. Toyne and Bell were given an additional four weeks holiday. It was also agreed that the Chief would issue a news release satisfactory to the grievors. Frankly, based on my review of the conduct of these officers and the poor judgment they displayed before and after the Pollock investigation, I believe there were ample grounds to resist this grievance and concessions to them were not warranted.

The news release issued by the Chief on the afternoon of March 28, 1991, announced to all and sundry that the police investigation into the Pollock matter "...was conducted in a professional manner...". The officers were absolved from blame. Since I have concluded that this was certainly not a professional investigation by any standards other than volume, I am forced to conclude that this statement was unacceptable and never should have been made. Moreover, by this juncture, there were representatives of the city at the meeting who should have known or did know that this had been an extremely inadequate investigation.

I know something of the give and take in negotiating a settlement in a labour management environment but I understate it when I say that I am astounded that this proposition was allowed to make its way into a press release. There is no doubt, of course, that Toyne, Bell and Dawson agreed with that proposition and Stephen remained committed to it. He told the Inquiry that with respect to the news release;

> "Well, the first paragraph refers to the investigation which was conducted, and which I say was conducted in a professional manner in accordance with the standards of the Winnipeg Police Department. I believe that 100 percent." (p. 3230)

I have already indicated that this is at variance with his concession that much of the investigation carried out after the arrest should have been conducted prior to the arrest. There are other parts of the news release which give me trouble such as the statement that;

> "The reason for the transfers of ...Toyne,...Bell and...Dawson...was not disciplinary in nature and was not related to the Winnipeg Police Department investigation of allegations against Harvey Pollock." (p. 3230)

Even Toyne did not agree with that. In giving his evidence, he said;

> Q. "Yes. And you were advised, were you, that the transfers were not to be disciplinary in nature?
>
> A. No, I wasn't advised that. I was advised I was being transferred on the manner in which the Pollock Investigation was handled. I assumed this was a disciplinary matter.
>
> Q. You assumed, sir?
>
> A. I don't know what else I could have assumed. I was being transferred because the Chief did not agree with the way I handled the Pollock matter." (pp. 2166-2167)

I was shocked when I heard what the public had been told by the Chief on March 28, 1991. Again, I must appreciate that this release was a negotiated document. However, public officials should never permit expediency to replace honesty and forthrightness. The public was told that the transfers had nothing to do with the Pollock investigation. The explanation advanced to rationalize that proposition was, in my opinion, mere sophistry. But for the Pollock incident, the transfers would not have taken place.

The Chief's knowledge of the serious problem in the working relationship between the Crime Division and the Crown Office is unclear. His testimony left me with the impression that he either did not know about the concerns expressed at the Inquiry with respect to Whitley's integrity or he did know about those concerns but hoped they would go away and did nothing about them. While the Chief did not seem to be prepared to commit himself clearly to either position, I am satisfied that, as the head of the department, if there were real and serious concerns, it was his business to know about them. If the integrity of the man who effectively functioned as the Director of Prosecutions for the Province of Manitoba was questioned on even one occasion, I would have expected the Chief to investigate those concerns thoroughly, and, if there appeared to be any substance to them, to approach the Deputy Minister or the Attorney General. He did no such thing. Myers suggested that Whitley should have been aware of the concerns as to his integrity and he must bear some responsibility for failing to resolve the problem which had arisen in the working relationship with the Crime Division. Whitley denied knowledge of the negative view of his integrity and I believe him. His evidence has been confirmed by the senior police officers who testified that they never confronted Whitley with any of their concerns. The responsibility for the sorry state of the relationship between the Crime Division and the Department of Justice that existed in October 1990, lies firmly in the hands of the Chief and the senior members of the Crime Division involved in the Pollock investigation.

There is evidence of substantial improvement in the relationship between Crown counsel and the Winnipeg Police Department over recent months. In January 1991, the administrative changes were carried out in the senior ranks of the Crime Division. Stephen said that Toyne, Bell and Dawson were moved out of that Division in order to change the atmosphere that was existing between Crown attorneys and senior staff in the Crime Division. As noted, Johnston took early retirement. Reynolds and the Chief say there has been a significant improvement in the working relationship since that time and Reynolds goes so far as to describe it as being excellent. Whitley says this of the current situation;

> "The new regime, if you permit me to term it that way, in the Crime Division is excellent. I have had more briefings and consultations in the last three months than I have had in three years." (p. 4469)

If things are as good as Reynolds, the Chief and Whitley believe they are, then the turnaround can only be described as miraculous. I am only cautiously optimistic because the relationship was so poisoned. I would require more evidence before I could say with total confidence that the body has returned to a state of full and complete health.

CHAPTER VIII
CONCLUSIONS AND RECOMMENDATIONS

A. GENERAL

The directions under which I have carried out this assignment are contained in the Order in Council that is recited at the commencement of this report. The body of my report has been directed to a careful consideration of the terms of reference set out in that Order in Council. I have attempted to give specific attention to each area of concern. Many conclusions of a general nature are to be found throughout the body of the report and often recommendations are inherent in them. The specific conclusions which I have reached and the recommendations which I make thereafter do not, therefore, reflect all of the concerns expressed in the body of the report. They should be viewed only as a summary form of answers to inquiries I was directed to make and solutions that I believe to be appropriate. Where I have concluded that there was good faith and objectivity, or where the correctness and adequacy of the procedures have been beyond reproach, I have tried to say so. Alternatively, where the opposite is true, I have attempted to identify the problem in order to lay the groundwork for a potential solution of that problem.

B CONCLUSIONS

1. G.H.'s actions in reporting to the Law Society of Manitoba, her objection to the lecture Pollock gave to her about her drinking habits and also his touching her lower back area were appropriate actions for her to take.

2. G.H. was an honest witness. However, accuracy and honesty are not always synonymous. A good investigator should be aware of this distinction.

3. G.H. has been consistent throughout in verbally describing what occurred. However, from time to time the detail of her demonstrations of what occurred may have varied. This was of no significance to her although others placed great weight on her displays. G.H. understood that Mr. Pollock was attempting to locate her injury and his touching was restricted to the area of the injury. This was clearly communicated to the police and Crown.

4. The controversial "touch" was a rubbing in the tailbone area, alternatively described as an area of the lower back about 4-6 inches down from the waist and sometimes referred to by G.H. as her bum.

5. The touch just described did not constitute a sexual assault and in any event Pollock never had the requisite criminal intent.

6. The police investigation was conducted with indecent haste and with no apparent need for that haste that is rooted in either effective law enforcement or the administration of justice.

7. The inflexible policy of the Winnipeg Police Department that dictated the arrest of Pollock on the morning of October 10, 1991, is faulty and probably unlawful. It should be replaced by one that allows for an assessment of the facts of each particular case under consideration.

8. An attempt to take a warned statement from Pollock prior to deciding to arrest or charge should have been made.

9. In addition to interviewing the accused, the investigators should have completed the balance of their investigation before arresting or charging Pollock. Investigation after a public arrest is unlikely to be objective and will predictably attempt to support a decision already taken. That occurred in the Pollock case.

10. A proper Crown opinion should have been requested. Full disclosure of all facts should have been made to Crown counsel in a calm and reasoned environment so as to allow for a proper decision on whether a charge should be laid. The sensitivity of this matter and the frailties of the case should have directed the senior police officers to that conclusion.

11. The investigators should have made an attempt to discover and then draw to the attention of the Crown, the weaknesses in the case as well as its strengths. They did not do so.

12. The reasons given for not seeking a Crown opinion in the Pollock matter are unsupportable. Firstly, the allegations with respect to the lack of integrity and absence of trustworthiness made about the Assistant Deputy Attorney General, Criminal Justice, S.J. Whitley, Q.C. were totally unsubstantiated by the evidence and were unfair, unjust and without any merit whatsoever. Secondly, no factual basis has been shown to exist for the allegation that an unbiased opinion from the Crown was not possible because the potential accused was a lawyer.

13. The choice of Britton as prosecutor was appropriate and his appointment met the ethical obligations of the Crown to prosecute the case in a fair and competent manner.

14. The stay of the sexual assault charge on the morning of December 19, 1991, was a proper course of action for Crown counsel to follow at that time. It was also appropriate that the matter not proceed on the basis of common assault.

15. The allegation of incompetence levelled by the police at Britton with respect to his performance at trial is baseless and represents an unfair and unjustified attack upon him.

16. The unsupported attacks on the integrity of Whitley and the competence of Britton by Toyne, Bell and Dawson at the Inquiry demonstrated a lack of insight and judgment.

17. The Chief of Police was either not aware of the animosity that the leaders of his Crime Division had with respect to Whitley, or, if aware of that animosity, he did nothing about it. In either case he did not display the leadership required to resolve the problem.

18. The Chief of Police was responsible for the news release extolling the professionalism of the investigation and denying that the Toyne, Bell and Dawson transfers were related to the investigation. Moreover, the Chief was one of the last witnesses at the Inquiry. Based on all of the knowledge he then possessed, he still declared this to be "one of the most thorough investigations I have ever seen". These actions on the part of the Chief were woefully inadequate displays of leadership.

19. The Reynolds report was a perceptive document and the recommendations of Reynolds were justified.

20. Once in possession of the Reynolds report the City of Winnipeg should not have been party to an announcement endorsing the investigation as having been conducted in a professional manner and advising that the transfers of Toyne, Bell and Dawson were not related to the Pollock investigation.

21. I have previously undertaken to return to the consideration of two questions:

    (a) What motivated Toyne and Bell to refuse to give to Crown Attorneys the information which they required in order to properly advise them on the Pollock matter?

(b) What motivated the highly emotional reaction by the police to the court proceedings and their subsequent attempt to discredit the competence of Crown Counsel by a baseless and unjustified attack upon his performance at trial?

I have concluded that there is no rational explanation for the conduct of the police officers involved in the events referred to in these questions. What, then, could their motive have been?

There is no direct evidence that these officers cynically set out to sacrifice the reputations of Whitley and Britton in order to rationalize their actions. However, I have determined that there was no evidentiary basis for their allegations. Moreover, senior police officers have been trained to distinguish hearsay and speculation from proven fact. Therefore I am forced to conclude that at the very least with respect to Whitley and Britton, these officers embraced gossip and innuendo eagerly and irresponsibly. These were not merely innocent but mistaken beliefs on their part.

Having discarded all other reasons advanced by the officers for their conduct, I must come to a consideration of Pollock's suggestion that the charge of sexual assault against him was an attempt at payback by the Winnipeg Police Department because of his role in the Aboriginal Justice Inquiry into the death of J.J. Harper. A "vindictive" action he called it which "emanates out of Harper". It is a matter of record that, as counsel, he publicly and vigorously criticized the police force for its handling of the entire Harper matter. After hearing all the evidence surrounding the police investigation of the Harper death, the Aboriginal Justice Inquiry concluded in Volume 2 at pp 63-64 of the Harper portion of that volume:

> "It is our conclusion that Cross was accorded special consideration by fellow officers at every stage of the investigation. We can only conclude that this investigation was handled as though everything had occurred as Cross stated, and that the shooting 'investigation' was done merely to corroborate and reinforce Cross' story. Both at the scene of the shooting and during the subsequent interrogation much more attention was given to protecting Cross than was devoted to uncovering the facts of the case.
>
> This was not an independent, professional investigation. Those involved in all parts of this investigation were guided, at least to some extent, by the corporate, institutional goal of self preservation which functioned to reach a conclusion that Cross, and therefore the department, had done no wrong."

The transcript of evidence at the Aboriginal Justice Inquiry and the media record confirms Pollock's contribution to that conclusion. It is not unreasonable to conclude that many police officers may have resented his criticism. Indeed, this resentment was admitted by some officers at the Inquiry before me. Thus, motive to injure Pollock may very well have existed.

I am reluctant to conclude that there was an overt, planned and deliberate conspiracy to punish Pollock. On this issue, there was no direct evidence, nor could one rationally expect there would be. Proof that the chief investigator, Kushneryk tipped off the press of the impending arrest does, however, go a long way towards proving this theory. I do not accept that the tip was motivated solely by the fact that Kushneryk thought the newspaper reporter was a "nice guy and deserved a break". This is inconsistent with his assertion that he knew the meaning of a confidential investigation, had conducted many, and had never before chosen to tip off the media.

> Given the environment that existed following the close of the Aboriginal Justice Inquiry, am I to conclude that Kushneryk was on a frolic of his own? There is evidence that the attitude displayed, if not the act, was embraced by his immediate superiors, Bell, Toyne, Dawson and Johnston. Clearly, the conduct and attitude of these senior police officers was revealed by the manner in which they attacked Whitley and Britton. I conclude that Kushneryk's action was consistent with the prevailing attitude of his immediate superiors. Therefore I do not view it as an isolated act.
>
> Moreover, it has not escaped my attention that this whole incident did not arise as a result of G.H. contacting the police to complain of a criminal assault. The complaint may not have been created by members of the Winnipeg Police Department. However, I am left with the conclusion that it was carefully and uncritically nurtured by them. There is no doubt in my mind that Pollock was not liked by these members of the Crime Division. I am equally convinced that this animosity substantially accounts for the special treatment of this complaint, the premature arrest, uncritical investigation, manipulated Crown opinion, and emotional, sometimes irrational, commitment to the prosecution.
>
> While I stop short of finding an overt conspiracy, the influence of payback was at work in a far from subtle fashion and must be condemned. Further, the presence of that influence represents the most rational possible answer to the two questions I have posed.

These are difficult conclusions that I have reached. However, I trust they will assist in restoring the high level of integrity and effective policing which I understand the citizens of Winnipeg have rightly come to expect after years and years of dedicated and competent policing of their city. I wish to make it very clear

that criticisms I have made do not extend to the vast numbers of Winnipeg police officers whose integrity, professionalism and dedication are beyond reproach. In my view, with the exception of Kushneryk's role, this was substantially and overwhelmingly, a leadership problem. With the changes that have already been made, and those that will be made in the immediate future, I am confident that the significant problems addressed in this report will be, effectively and forever, put to rest.

C. RECOMMENDATIONS

1. Charging Policy

It is absolutely essential that there be in place a policy that clearly spells out the responsibility of the police on the one hand and that of the Crown office on the other with respect to the laying of charges. Each has a distinct and important role in the criminal justice system. The police are the investigators and the Crown carries the responsibility for the prosecution of accused persons. At the point where the investigation is concluded and the prosecutorial role comes into play the two chief participants must interface. They must do so with harmony and respect. Crucial to the cementing and continuance of that kind of relationship is a clearly defined policy with respect to the obligations and responsibilities of each. While it will be a Crown office policy, it must be one developed in consultation with senior police personnel.

In March of 1990, Whitley circulated to the Winnipeg Police Department, Brandon Municipal Police, and the Royal Canadian Mounted Police, for discussion purposes, a proposed charging policy. That policy has as its genesis comments of the Commissioners in the, then, recently released Marshall Inquiry in Nova Scotia. Those comments with which I am, like Whitley, in agreement provide in Volume I, Part 2, pp. 232-233;

> "Balance must be maintained between the right of the police to lay a charge and the right of any citizen not to be charged without a thorough investigation and due consideration. While our system clings to the presumption of innocence, it is an inescapable fact that charging an individual results in damage to that

> individual and his or her reputation or career that is all but irreparable.
>
> We do not wish to interfere with the rights of the police to lay a charge, but when competent Crown law officers give advice in good faith, we believe that advice should be rejected only after careful consideration. If there is a disagreement, it should be first discussed between the police force and the department of the Attorney General at correspondingly high levels. If a disagreement still exists after pursuing such discussions to the highest level on each side, the police should then, if they still feel it is warranted, lay the charge. The police department should have a clear written policy setting out the steps to be taken in the event of a disagreement between the police and Crown respecting the laying of a charge.
>
> There should be increased and more effective consultation between the police and the Crown in preparing charges in order to eliminate problems of overcharging or poorly drawn charges. At the same time, there should also be a system of post charge screening to facilitate the elimination of unnecessary charges prior to arraignment and the terminations of prosecutions that ought not to go forward".

Whitley's evidence satisfies me that the policy is at work, at least in most geographic areas of the province. Before its inauguration, input from the Royal Canadian Mounted Police and Brandon Municipal Police was apparently taken into account. Communication between the Crown office and the Winnipeg Police Department was not open and ongoing on this subject during 1990. I am not satisfied that full consultation and concurrence between these two major players

is yet complete. A subsequent recommendation in this report calls for a high level liaison committee between the Crown office and the Winnipeg Police Department. One of its first assignments must be to consult and arrive at consensus on this matter. The policy must then be implemented fully and without reservation.

2. Crown Opinions

Police officers should be encouraged to seek Crown opinions in all cases of factual or legal complexity. The types of cases that would fall into that category would be, inter alia, those where:

(i) The proposed charge or the potential accused is such that the public perception of the administration of justice, generally, could be brought into question or in some other way affected;

(ii) The potential accused is a peace officer, judge, lawyer or other court or justice system official or employee and thus a perception of conflict of interest could arise;

(iii) The proposed charge is based on the uncorroborated evidence of a single complainant.

The Crown office must be receptive to receiving requests for opinions in these kinds of cases. It is better for police officers to err on the side of frequent consultation than to make sparse use of the availability of this expertise.

When seeking the opinion or advice of Crown counsel, police officers must advise the prosecutor of all available evidence and all the circumstances of the alleged offense including the identity of the potential accused. Information should never be withheld or edited as it may

impact on the quality of the opinion obtained. In circumstances where necessity, not inconvenience, requires that an opinion be obtained quickly, probably by telephone, care should nevertheless be taken to convey as thoroughly and objectively as possible all of the information currently available at that time.

Time guidelines should be established within which police can expect a Crown opinion will be delivered. Those guidelines should be arrived at through the consultative process and should be an early task of the liaison committee.

3. Arrest Procedure

The City of Winnipeg Police Department with the assistance of the Crown office should formulate written arrest policies which are consistent with the Criminal Code of Canada. These policies should be applied in a manner consistent with the Bail Reform Act and proper investigative techniques. Strong consideration should be given to reducing the number of warrantless arrests. Such arrests should not be routine and employed in order to avoid paper work.

4. Investigative Procedure

(a) Police officers should be instructed to obtain warned statements from all accused persons prior to arrest wherever this is feasible. Where an arrest is necessary prior to interview, investigators still should be instructed to communicate to the accused a sincere interest in hearing any explanation he or she is prepared to offer.

(b) Investigators should be instructed to gather all relevant evidence, including evidence which may reveal deficiencies in the case. All information should be relayed to Crown counsel when communicating pursuant to the charging policy or seeking an opinion or advice.

(c) The evidence of Whyte addressing the objects and procedures of an investigation should be preserved, in its entirety, distilled and used at the training academy in courses addressing the subject of police investigative techniques.

5. Procedure Where a Charge is to be Laid

In all cases where a decision is made to lay charges, police officers should follow the guidelines in the Criminal Code of Canada with respect to the process of charge, arrest and release of the accused person.

6. Liaison Committee

The events reviewed in this report dating back to Ticketgate, Gindin, the Aboriginal Justice Inquiry and Pollock have had an obvious debilitating effect on criminal justice as it is practiced and delivered in the City of Winnipeg. There have been particular strains on the Crown-police relationship. It is essential that the highest officials of each partner in that relationship monitor the maintenance of harmony and cooperative endeavor between them. To that end, a liaison committee of the Chief of Police, the Deputy Chief of Police in charge of the Crime Division, the Assistant Deputy Attorney General-Criminal Justice and the Director of Prosecutions for the City of Winnipeg should meet monthly for the next twelve months, and afterwards, as required. Initial tasks for the committee have been identified in preceding

recommendations and many others will be readily apparent to them. On a quarterly basis, for at least the first year, Commissioner Reynolds and Deputy Attorney General Garson should attend committee meetings for two purposes. First of all, they must assure themselves that harmony and a cooperative relationship have been achieved. Secondly, they should impart the wisdom, knowledge and guidance that they are able to contribute, based upon the vast experience they have each gained in their successful professional careers. I am mindful that Reynolds does not have legal and direct police experience but I am satisfied that the other attributes I have just mentioned will make him a useful participant along with the Deputy Attorney General.

7. Police Education

Emphasis must be placed on upgrading education within the City of Winnipeg Police Department. This should include both initial instruction of police recruits and continuing education for members of the force. It is not sufficient to rely on the circularization or posting of bulletins from a central police college with respect to changes in the law. Such bulletins are frequently overlooked and often misunderstood. Volunteers from the legal profession should be solicited to provide lectures on topics of interest to the police force and changes in the law. Not only would this serve to better educate the force but it might create a productive bridging between the force and members of the legal profession.

8. The Chief of Police

The Chief of Police has announced his retirement. A Canada wide search should be conducted immediately for a new Chief of Police. It should be an accelerated, but thorough, search for the most suitable candidate. The successful

person should be encouraged to commence employment as Chief at the earliest possible date. If the current Chief is still in office when the successful candidate is available to commence his or her duties, arrangements should be made for the existing Chief to immediately take the benefits of the Department's retirement program.

The Winnipeg Police Department requires progressive, decisive and fair minded leadership from its new Chief. I recommend that major initiatives and decisions requiring the kind of leadership I have just described should await the arrival of the new Chief. Ongoing decisions relating to day to day events in the Department will rest with the incumbent of the office of Chief.

9. Inspector Dawson

The return of Dawson to the Crime Division should not occur until such time as the new Chief of Police has concluded that that would be an appropriate step to take.

10. Costs

It is my understanding that all those represented at the Inquiry by counsel, other than Pollock, are to have their legal costs paid at agreed rates by either the Province or the City or a combination of both. McCaffrey, on behalf of Pollock, participated in the Inquiry in a useful and helpful way. It is only fair and reasonable that the costs incurred by that representation be covered by the City and Province at the rates at which Commission counsel have been remunerated.